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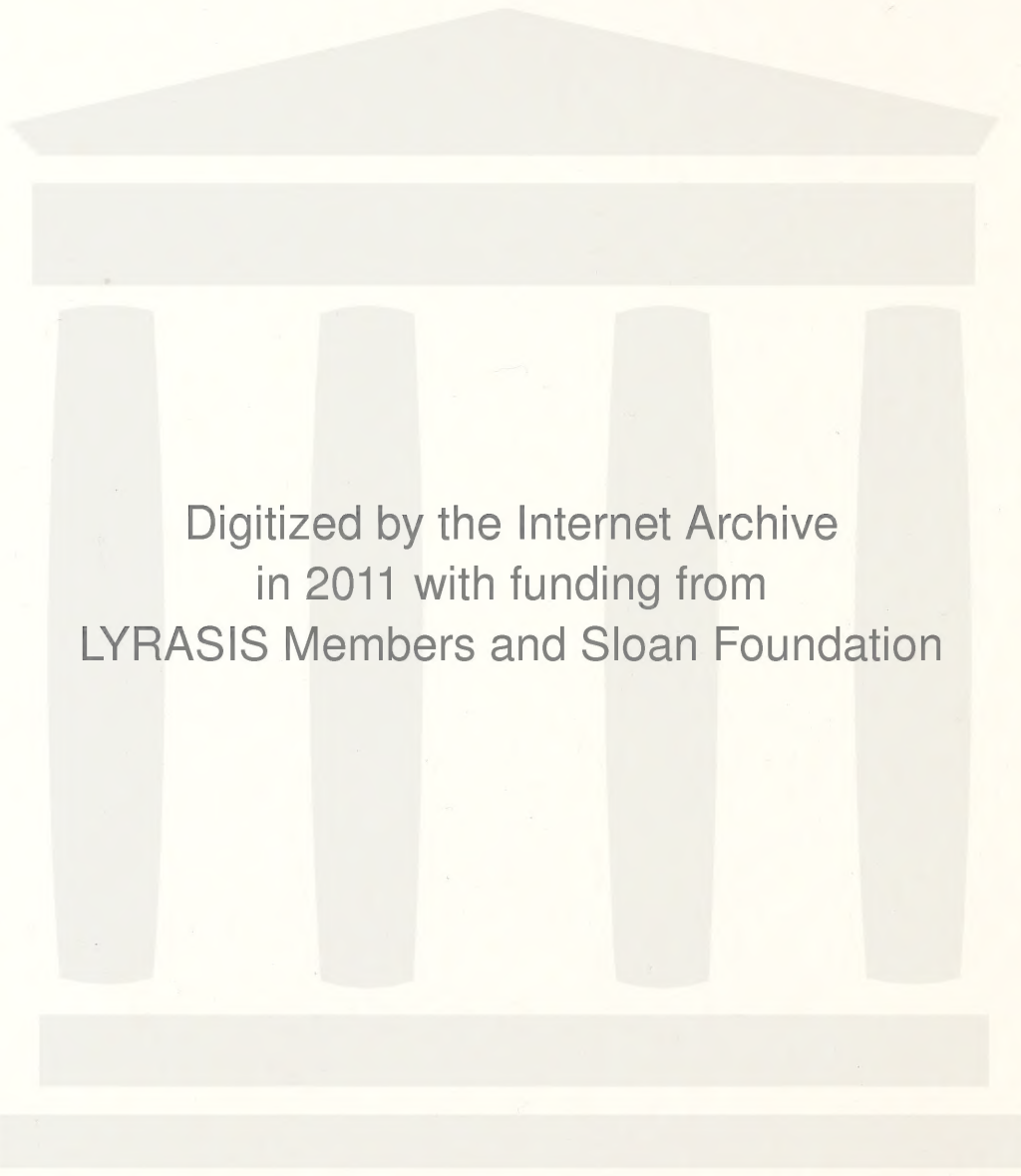
1993 SURVEY OF RECENT DEVELOPMENTS IN INDIANA LAW

CONTRIBUTORS TO THIS ISSUE

The Honorable Chief Justice Randall T. Shepard

Tim A. Baker
John W. Barker
Kevin W. Betz
Lisa B. Bingham
Robert F. Blomquist
Ivan E. Bodensteiner
Frank E. Booker
Douglass G. Boshkoff
Susan D. Burke
Richard E. Deer
Andrew T. Deibert
Brad A. Galbraith
Harold Greenberg
Rolanda Moore Haycox
Lawrence A. Jegen, III
Bart A. Karwath
Sheila Kennedy

Charles M. Kidd
Walter Krieger
Rosalie Berger Levinson
John R. Maley
Donald S. Murphy
George T. Patton, Jr.
Marci A. Reddick
Charles R. Reeves
Richard K. Shoultz
Andrew Z. Soshnick
Donna McCoy Spear
R. Robert Stommel
John C. Trimble
John R. Van Winkle
Judy L. Woods
David C. Worrell



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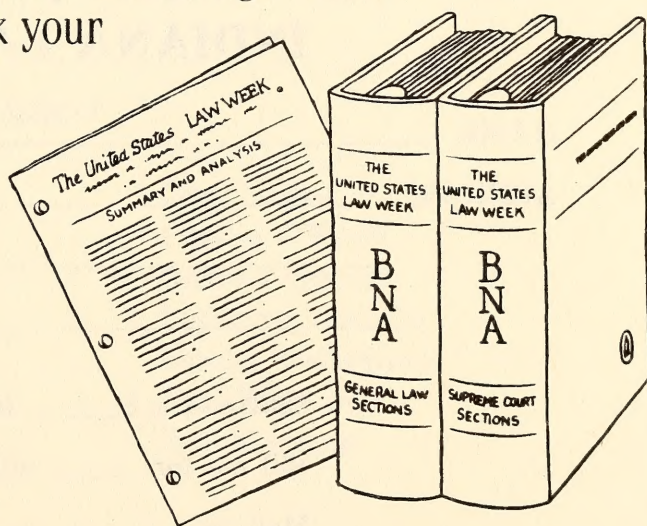
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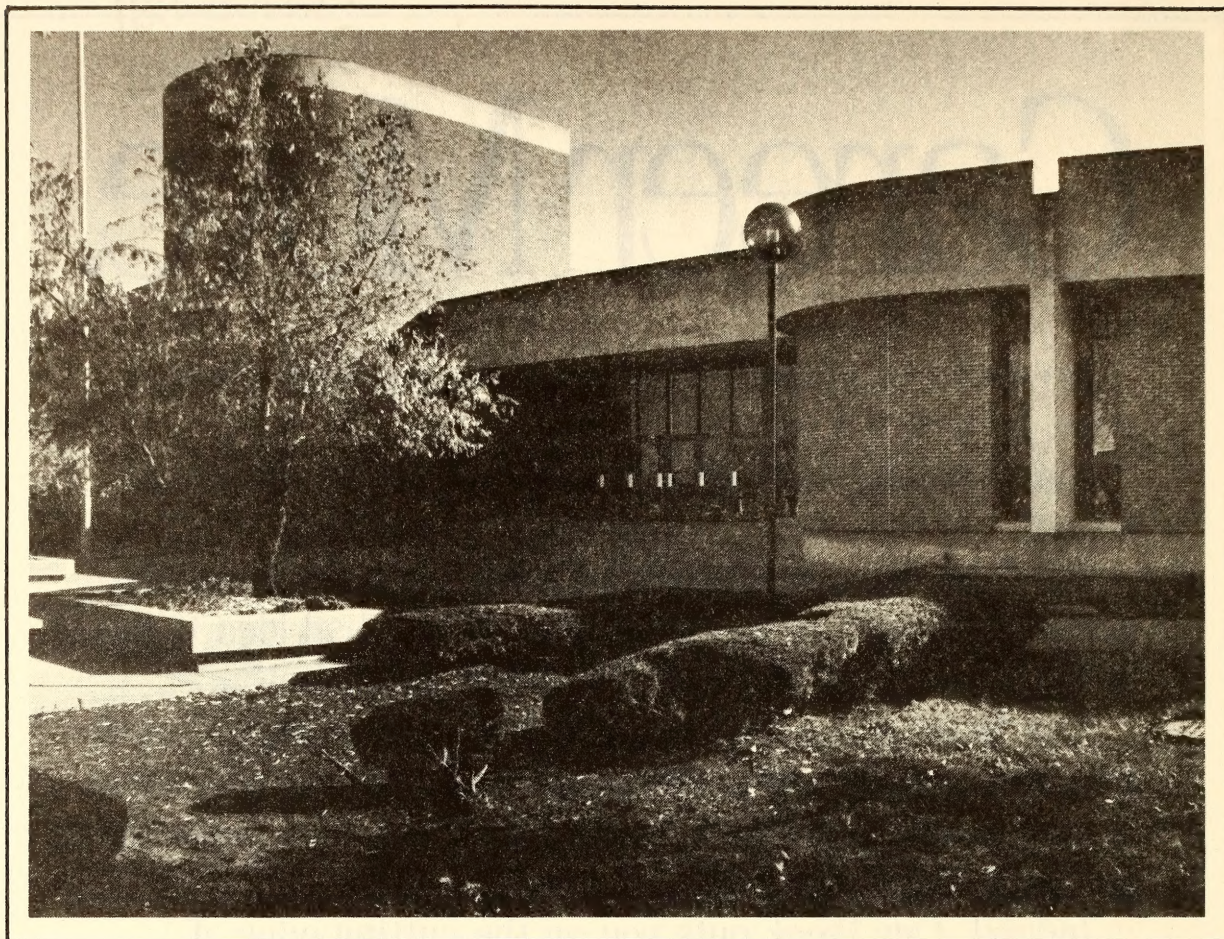
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Indiana Law Review

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LAWYER-BASHING AND THE CHALLENGE OF A SENSIBLE RESPONSE

RANDALL T. SHEPARD*

INTRODUCTION

Last year, much of the conversation in legal circles centered on our profession's declining public image. Lawyer jokes seemed to be part of every conversation, broadsides to the legal profession a part of every newscast. Public opinion polls revealed that the image of lawyers had reached its lowest level in a decade. Of course, lawyers have always been the object of some public suspicion, but these historic attitudes fail to explain the recent precipitous decline in public trust.

The organized bar took the problem seriously. It approached the problem from the position that a loss of faith in lawyers could eventually threaten the standing of the legal system itself. The bar first concluded that the problem lay in the public's misperception of our work, and it launched a public relations campaign to restore our image. The bar initiated projects to improve lawyer/client relations, restrict advertising, and publicize lawyers' charitable activities. These efforts fit well the conclusion that it was the public's perception of the legal system and not the system itself that was the central problem.

I conclude instead, as I think many now acknowledge, that significant segments of our population are already frustrated with the legal system and that their low regard for the profession is actually a symptom of that disenchantment. To address this problem successfully, we must discern the causes of the public's grievances and attend to those causes, not simply seek to change the way we are perceived. Americans tell us they believe that the judicial process is too slow, too expensive, and too complicated, and we must be more ready to accept their judgment. Only by seeing ourselves through the public's eyes and taking their criticisms seriously can we alleviate their frustration, improve the legal system, and repair our professional image.

We must also recognize that the public's opinion of our profession is not prompted solely by the way we do our work. The public also reacts to the substantive results of our work. Those of us in the legal system know that effecting justice is our job, but we easily forget that the public has its own view about whether we make the world more just. The role we have played in public education, for example, is seen as unjust by many Americans. We have thwarted community efforts to promote a safe and well-disciplined educational environment, and we have banished all religious references from classrooms and largely

*Chief Justice of the Indiana Supreme Court. A.B., 1969, Princeton University; J.D., 1972, Yale Law School.

from school events. A legal system that regularly produces outcomes regarded as unjust or ill-considered by most of its customers cannot expect to be respected by its customers.

I. GROWING PUBLIC FRUSTRATION WITH OUR PROFESSION

One reason why we lawyers are slow to react to criticism is that public distrust of our profession has such an ancient pedigree. It has been almost 400 years since Shakespeare penned his famous allusion to this sentiment.¹ At the founding of this nation, the American colonists attempted to realize "[t]he dream of doing without lawyers" by prohibiting the profession altogether.² This long history of complaints about lawyers, however, does not adequately explain the decline in our public image over the past two decades.

A survey done for the American Bar Association revealed that public confidence in law firms has declined substantially since the early 1970s.³ The percentage of Americans expressing "great confidence" in the profession has dropped from 24% to 18% to 14% and finally to a low of 8% since 1973.⁴ The Gallup Organization has recorded a similar trend in public opinion regarding the honesty and integrity of lawyers. In the mid-1970s, Gallup found that more than 25% of Americans believed that lawyers had high or very high ethical standards. By 1993, that figure had dropped to barely 16%.⁵

We often find it tempting to brush off these results with the observation that "the public does not really know what we do." This explanation is unavailing, however, in light of the apparent depth of knowledge people have about lawyers. More than 60% of Americans have hired an attorney in the past ten years, and 50% interact with lawyers on a fairly regular basis.⁶ More damning yet, it seems that the more exposure people have to our profession, the lower regard

1. WILLIAM SHAKESPEARE, *THE SECOND PART OF KING HENRY THE SIXTH* act 4, sc. 2. For a discussion of the misunderstandings surrounding Dick's sarcastic suggestion, "The first thing we do, let's kill all the lawyers," see Steven H. Kruis, *Let's Not Kill All the Lawyers*, RES GESTAE, Oct. 1993, at 151.

2. LAWRENCE M. FRIEDMAN, *A HISTORY OF AMERICAN LAW* 45-46 (2d ed. 1985) ("The dream of doing without lawyers has been a persistent one; and the cognate dream of a simple, clear, natural form of justice, a book of law that everyone might read for himself, also never died."); KERMIT L. HALL ET AL., *AMERICAN LEGAL HISTORY* 305 (1991) (quoting early Pennsylvania citizen, who explained that "[t]hey have no lawyers. Everyone is to tell his own case, or some friend for him. . . . 'Tis a happy country.'").

3. See Gary A. Hengstler, *Vox Populi, The Public Perception of Lawyers: ABA Poll*, A.B.A. J., Sept. 1993, at 60 [hereinafter *ABA Poll*]; see also Randall Samborn, *Anti-Lawyer Attitude Up*, NAT'L L.J., Aug. 9, 1993, at 1 [hereinafter *NLJ Poll*]; Erik Hromadka, *Lawyers Battle Tarnished Professional Image*, RES GESTAE, Oct. 1993, at 152.

4. *ABA Poll*, *supra* note 3, at 63-64.

5. Randall Samborn, *Tracking Trends*, NAT'L L.J., Aug. 9, 1993, at 20.

6. *ABA Poll*, *supra* note 3, at 61.

they have for our work. A survey for the *National Law Journal* revealed that as the number of people having contact with lawyers increased from 52% to 68% from 1986 to 1993, the percentage that believed lawyers were less honest than most people increased from 17% to 31%.⁷

Furthermore, the people most likely to have contact with lawyers have worse impressions of the profession than those who rarely deal with us. The ABA poll revealed that 41% of the individuals with experience with the legal system have generally unfavorable attitudes, while only 25% of those with little exposure to the justice system registered negative opinions.⁸ Most disappointing of all, a substantial percentage of people who have been part of a jury trial, which we lawyers tout as a peak legal experience, hold negative views.⁹

II. RESPONDING TO OUR CRITICS

Initially, the American Bar Association responded to the tide of public criticism by focusing its resources on the perception of lawyers rather than the substantive problems with the justice system.¹⁰ The board of governors approved a \$700,000 public relations campaign, hiring one of the nation's most expensive Washington image-makers, Michael Scanlon, for a reported \$170,000 and retaining Robert Squier's public relations firm to support Scanlon's efforts.¹¹ The bar focused on improving lawyers' "deskside manner," ensuring that lawyers appear "dignified" in advertisements, and publicizing pro bono activities.¹²

7. *NLJ Poll*, *supra* note 3, at 20; *see also* Report of the Chief Justice's Commission on the Future of the Courts, *Reinventing Justice 2022* (Supreme Judicial Court, Commonwealth of Massachusetts 1992) [hereinafter *Reinventing Justice*].

8. *ABA Poll*, *supra* note 3, at 62, 63; *see also Reinventing Justice*, *supra* note 7, at 12 ("Although slightly less than a quarter of those surveyed felt informed about the courts, the more informed they were, the more likely they were to rate the courts' performance as 'poor.'").

9. *Id.* at 62 ("Two of the strongest predictors of an individual's negative feelings about lawyers are having served on a jury and having been sued."); *see also* Daniel Wise, *Survey: Jurors Take Dim View of Lawyers*, N.Y. L.J., Nov. 12, 1991, at 1.

10. Not surprisingly, the surveys conducted by the profession seem also to presuppose that the problem lies with a misperception of lawyers personally rather than with the role of attorneys in the legal system. Typical of recent surveys, the *NLJ* asked "What do you think lawyers can do to improve their image?" Not surprisingly, people responded in personal terms, saying that lawyers should be more honest and less greedy, charge less, provide better services, and stop advertising. *NLJ Poll*, *supra* note 3, at 20.

11. *NLJ Poll*, *supra* note 3, at 22; *see also* Edward A. Adams, *Abortion, Recession, Image on ABA's Mind*, N.Y. L.J., Feb. 9, 1993, at 1; Ann Pelham, *ABA Sparing No Expense to Polish Lawyer Image*, *The Recorder*, Nov. 23, 1992, at 3. For a discussion of the debate over such an expenditure during tight fiscal times, *see* Monica Bay, *Conventioneers Get Dose of ABA-Speak*, N.J. L.J., Aug. 16, 1993, at 12.

12. R. William Ide, III, *What the ABA Plans to Do*, A.B.A. J., Sept. 1993, at 65; *see also ABA Poll*, *supra* note 3, at 62-63 (emphasizing public perception that lawyers are unfeeling, unethical, and greedy and suggesting that lawyers curtail advertising); Eileen Ambrose, *Jokes: Disorder in the Court*, *INDIANAPOLIS NEWS*, Mar. 1, 1994, at F1 (discussing ABA training courses to improve

Efforts of the foregoing sort likely have value, but we must not allow the attention surrounding such image-making to distract us from the need for more substantive efforts. Sometimes the appearance of activity allows us to pass over even the most obvious deficiencies. I will name here but two.

First, despite mounting public complaints and our own private admissions, many lawyers still deny the inefficiency of modern civil litigation. We run a tort system in the name of compensating victims and promoting safety, but we exact a pretty high tariff. A 1986 Rand Corporation study found that the total costs of tort litigation, including attorneys fees and court costs, were actually greater than the compensation to plaintiffs, with between \$16-19 billion going to expenses as compared to \$14-16 billion in compensation.¹³ Of these costs, 21% were attributable to the plaintiffs' attorneys fees and expenses, and 16% went to defense counsel. Accounting for court costs and the value of the time spent by the litigants, the injured parties received only 46% of the total cost in net compensation.¹⁴

The settlement agreement in a recent class action suit stands as a striking example of this problem. Suit was brought against an investment firm for defrauding its clients out of tens of thousands of dollars. After successful negotiations, counsel settled the case. Unfortunately, "success" is a relative term. Beatrice Gindea, a named plaintiff was shocked to learn that her \$10,000 claim had been settled for a mere \$400.¹⁵ Her attorneys grossed \$6 million.¹⁶

We have found it difficult to debate the reality of these transaction costs candidly in legal circles. When, for example, former Vice-President Dan Quayle addressed an ABA gathering in 1991 and suggested various tort reforms, including limits on punitive damage awards, then ABA President John Curtin defended the status quo without so much as considering the merit of the proposals. Curtin's carefully calculated effort to embarrass the vice-president¹⁷

lawyer/client communications and suggesting stricter guidelines for legal advertising).

13. Institute for Civil Justice, *Annual Report* 52 (1991) (citing James S. Kakalik & Nicholas M. Pace, Institute for Civil Justice, *Costs and Compensation Paid in Tort Litigation* (1986) for propositions that plaintiffs received between \$21-25 billion in gross compensation, with \$6-8 billion going to plaintiffs' attorneys and \$5-6 billion to defense counsel).

14. *Id.*; see also Laurie Asseo, *Slugging It Out in Court, the American Way*, L.A. TIMES, Apr. 5, 1992, at A20 (citing ICJ statistics).

15. Kurt Eichenwald, *Millions for Us, Pennies for You*, N.Y. TIMES, Dec. 19, 1993, at F1. Adding insult to injury, Mrs. Gindea also found that she and the other class plaintiffs were excluded from a \$371 million fund established to repay nonclass members for the same injuries. *Id.*

16. While firms specializing in class actions admit that plaintiffs with relatively large damages should pursue their claims individually, this did not prevent Mrs. Gindea's lawyers from taking the money and running. *Id.* at F12.

17. David C. Beckwith, *Quayle Hunting*, A.B.A. J., Dec. 1991, at 10 (explaining that Curtin's request that Quayle stay long enough to hear Curtin's rebuttal, contrary to the agreed schedule, was declined, and that Curtin leapt to his feet and began speaking anyway, forcing Quayle to play his straight man).

did little more than infuriate an already frustrated public.¹⁸ Such stonewalling by the profession surely promotes reactions through legislative processes.¹⁹

Second, the legal academy has also been reluctant to acknowledge criticism. An ABA task force, chaired by Sullivan & Cromwell partner Robert MacCrate, recently recommended a stronger focus on training law students and attorneys in the skills and values that make for good lawyering.²⁰ The task force concluded that such training would increase the quality and speed with which legal services are rendered while at the same time lowering the cost of those services to the average consumer. The response of law school faculties to the portions of the *MacCrate Report* aimed at the academy can at best be called mixed.²¹

A year after the MacCrate commission issued its report, the Illinois Bar Association embraced one of the least substantive recommendations. Illinois

18. See David Broder, *Quayle Charges Some Lawyers Are 'Ripping Off the System,'* WASH. POST., Sept. 7, 1991, at A2 (reporting that Quayle's mail was running fifty to one in favor of reform proposals); Sandra Torrey, *Quayle and Curtin Generate More Heat than Light in ABA Debate,* WASH. POST, Aug. 19, 1991, at F5 ("[Quayle and Curtin's] spat didn't do much to get at the real issues."); see also William Buckley, *Halve the Lawyers, Double the Justice,* ST. LOUIS POST-DISPATCH, Aug. 21, 1991, at B3 (The exchange between Quayle and Curtin "reminds us that the ABA is in many respects just one more trade association, as anxious to maintain its tariffs, minimum-wage laws, tax loopholes and immunity to antitrust legislation as any other vested interest."); James Kilpatrick, *A Compelling Case for Legal Reform,* ST. LOUIS POST-DISPATCH, Aug. 30, 1991, at E3 ("If the organized bar does not understand the need for these reforms, something is sadly wrong with the organized bar.").

19. In the health care area, for example, when Hoosiers learned that the number of medical malpractice claims filed had increased forty-two percent, the average award had increased more than 250%, and malpractice insurance premiums had shot up 410% from 1970 to 1975, they demanded and received reform. The General Assembly enacted the Medical Malpractice Act of 1975 (codified as amended at IND. CODE ANN. art. 27-12 (West Supp. 1993)) which capped damages and instituted a medical review panel. See Eleanor D. Kinney et al., *Indiana's Medical Malpractice Act: Results of a Three Year Study*, 24 IND. L. REV. 1275, 1276 (1991); see also Joanna Stark Abramson, *Contingent Fees Under Attack,* MICH. LAWYERS WKLY., Oct. 14, 1991, at 1 (discussing Michigan initiative to limit contingency fees).

20. *Report of the Task Force on Law Schools and the Profession: Narrowing the Gap*, A.B.A. Sec. Legal Educ. & Admissions to Bar (1992) [hereinafter *MacCrate Report*]. The report delineates ten skills categories and four values categories, all of which are considered important for a complete legal education. According to the *Statement of Fundamental Lawyering Skills and Professional Values*, law schools should endeavor to instruct students in problem-solving, legal analysis, legal research, factual investigation, communication, counseling, negotiation, litigation and alternative dispute resolution, organization and management of legal work, and recognizing and resolving ethical dilemmas. *Id.* at 135-36. Further, the schools should emphasize the following values: the provision of competent representation; the promotion of justice, fairness, and morality; improving the profession; and professional self-development. *Id.*

21. The Association of American Law Schools, for instance, asked the deans of its more than 150 member schools whether they would support using the MacCrate Report as a measure of school performance in the ABA accrediting process. Thirty-six percent supported use of the Report in accreditation, while sixty-four percent rejected the idea. Memorandum from the Association of American Law Schools to the Deans of Member Schools (May 18, 1993) (from Council Agenda Book #1, June 1993 ABA Meeting [hereinafter *Agenda Book*]).

asked the House of Delegates to amend the ABA's accreditation standards to declare that law schools should not only prepare students for admission to the bar but also "prepare them to participate effectively in the legal profession."²² This seemingly small modification was resisted by most law schools. Deans from Stanford, Michigan, Cornell, Northwestern, Pennsylvania, Duke and elsewhere opposed adding this language to the definition of a law school's mission. Some objected to the very notion that law schools should or even could prepare students to practice law upon graduation.²³ Most, however, agreed with the goal of the amendment but feared that its vague wording would permit ever increasing ABA control over their curricula and an eventual homogenization of law schools generally.²⁴ Still others seemed to deny the problem all together.²⁵ In the end, the ABA Section of Legal Education and Admissions to the Bar assented only after it became apparent that the section's credibility was at stake.

22. Memorandum from James P. White, Consultant on Legal Education to the ABA, to the Council of the Section of Legal Education and Admissions to the Bar (May 19, 1993) (from Agenda Book); see also Richard C. Reuben, *Changing Legal Education: House Endorses More Practical Training by Law Schools*, A.B.A. J., Apr. 1994, at 113.

23. See Letter from Lee C. Bollinger, Dean of the University of Michigan Law School, to James P. White, Consultant on Legal Education to the ABA (Apr. 21, 1993) (from Agenda Book) ("Law schools are not well equipped to turn out graduates finely honed in immediate practice skills . . ."); Letter from Paul Brest, Dean of the Stanford Law School, to James P. White, Consultant on Legal Education to the ABA (May 3, 1993) (from Agenda Book) ("[The proposed amendment] errs both in attempting to micromanage the law school curriculum and in its implication that law schools should ensure that students are prepared for practice upon graduation."); see also Paul Brest, *When Should a Lawyer Learn the Way to the Courthouse?*, STANFORD LAWYER, Fall 1993, at 2 (criticizing *MacCrate Report* recommendations as an "intrusive and counterproductive approach"); John J. Costonis, *The MacCrate Report: Of Loaves, Fishes, and the Future of American Legal Education*, 43 J. OF LEGAL EDUC. 157 (1993) (criticizing *MacCrate Report* for failing to address issue of scarce school resources).

24. See Letter from John J. Costonis, Dean of the Vanderbilt University School of Law, to James P. White, Consultant on Legal Education to the ABA (Apr. 22, 1993) (from Agenda Book) ("Accrediting bodies should avoid adopting language of indeterminate meaning, and, therefore, should reject the amendment . . ."); Letter from Colin S. Diver, Dean of the University of Pennsylvania Law School, to James P. White, Consultant on Legal Education to the ABA (Apr. 23, 1993) (from Agenda Book) ("While the language added by the proposed amendment is innocuous in appearance, . . . [it] is intended as the opening wedge in a campaign to incorporate recommendations derived from the MacCrate Commission Report into the Accreditation Standards."); Letter from Pamela B. Gann, Dean of the Duke University School of Law, to James P. White, Consultant on Legal Education to the ABA (Apr. 13, 1993) (from Agenda Book) ("The detailed standards and interpretations increasingly destroy creativity and curricular initiatives and homogenize everyone.").

25. See Letter from Arthur R. Guadio, Dean of the University of Wyoming College of Law, to James P. White, Consultant on Legal Education to the ABA (Apr. 14, 1993) (from Agenda Book) ("[I]n my opinion . . . law schools today do a very good job in preparing members for the legal profession. . . . This proposed change must, therefore, raise a question about the potentially false expectations which might be created in the minds of the proposers.").

III. BEYOND IMAGE

The Supreme Judicial Court of Massachusetts understood the importance of moving beyond issues of perception to address more systemic problems when it recently appointed a major commission to plan the future of the Bay State courts. Like the ABA, the Massachusetts commission began its work with a survey of public opinion, but rather than asking how people felt about lawyers themselves, it sought to measure attitudes towards the court system generally and to identify areas the public would like to see improved.²⁶ The people of Massachusetts responded with three principal criticisms: 88% complained that court proceedings were too slow, 81% believed that judicial processes were too expensive, and 79% found the courts hard to understand.²⁷

These are legitimate grievances and they deserve our attention, notwithstanding the fact that initiatives addressing these problems frequently meet with resistance from factions within the profession. If we are to address the substance of the public's frustrations, we must accept the accuracy of their criticisms. We must overcome resistance to change and embrace proposals that promise to make the legal system faster, cheaper, and simpler. I suggest here a few avenues for reform.

Surely, the modern process of discovery should command our attention.²⁸ Though it is probably the single most important procedural innovation of this century, it has become so cumbersome as to give trial by ambush a good name. Reform has come only slowly, beginning with the discovery rule revisions by the Arizona Supreme Court.²⁹ More recently, the United States Judicial Conference and the Supreme Court modified the Federal Rules of Civil Procedure in an effort to relieve the backlog of cases in the federal courts. The conference proposed and the Court adopted changes to the federal discovery rules designed

26. *Reinventing Justice*, *supra* note 7, at 12; *see also* The Chief Justice's Commission on the Future of the Courts, *Opinion Dynamics: Public Attitudes Toward the Future of the Courts* (1991) [hereinafter *Opinion Dynamics*] (available through Massachusetts Supreme Judicial Court's Public Information Office).

27. *Reinventing Justice*, *supra* note 7, at 26; *see also* *Opinion Dynamics*, *supra* note 26, at 20.

28. For insightful discussions of the factors involved in reforming discovery and procedures generally, compare Judith Resnik, *Failing Faith: Adjudicatory Procedure in Decline*, 53 U. CHI. L. REV. 1 (1986) (questioning reliance on lawyer-based adjudicatory procedures and managerial judging and advocating context-specific rules) with E. Donald Elliot, *Managerial Judging and the Evolution of Procedure*, 53 U. CHI. L. REV. 306 (1986) (advocating use of rules as incentive system for lawyer-based adjudicatory procedures and managerial judging). For a discussion of the history of the drafting of the Federal Rules of Civil Procedure, see Resnik, *supra*, at 5-22.

29. Two years ago, the Arizona Supreme Court adopted new discovery rules designed to speed civil litigation. Prior to their adoption, a lower court experimented with the new rules for six months. Of the 8000 cases tried under the scheme, nearly 3300 were arbitrated eight months earlier than under the old rules. Even more promising, almost 3000 cases were settled or abandoned by the parties. The rules are now in force in all 15 County Superior Courts. Richard E. Lerner, *Legislative Activity in the States*, N.Y. L.J., Aug. 6, 1992, at 3, 6.

to encourage particularized pleadings and promote settlements. Though the profession lobbied Congress to block the new rules,³⁰ these efforts failed, and Fed. R. Civ. P. 26 now requires attorneys to disclose information "relevant to disputed facts alleged with particularity in the pleadings." Whether these particular rule changes turn out to be beneficial or not remains to be seen, but we must turn our attention to these sorts of reforms.

Attorney discipline is another area ripe for change.³¹ The report of the ABA's Commission on Evaluation of Disciplinary Enforcement opined that "[t]he incompetence and neglect of relatively few lawyers must not continue to sully the image of the rest." Wishing will not make it so, however, and the organs of the profession have traditionally placed a low priority on complaints involving neglect of clients or client matters.³² The commission's emphasis on broadening the writ of state disciplinary oversight is worth examining. Happily, ABA President R. William Ide III has committed the association to improving "the attorney grievance, ethics and disciplinary process . . . to ensure that client concerns can be heard in a timely, effective manner."³³

Finally, while the formal law continues to grow in complexity,³⁴ there is even room for optimism on this front. Lawyers and clients alike are praising alternative dispute resolution as an informal option to court proceedings. Many states, including Indiana,³⁵ have been experimenting with binding arbitration,

30. See *Congress Fails to Block Change in Rules of Civil Procedure*, 8 LIABILITY WEEK No. 46, Nov. 29, 1993; Colleen McMahon, *Critics Turn Up Heat on Proposed Discovery Rules*, N.Y. L.J., July 19, 1993, at S1.

31. ABA Commission on Evaluation of Disciplinary Enforcement, *Report to the House of Delegates*, Feb. 3-4, 1992, at 9.

32. The commission on discipline repeatedly laments that the profession lacks disciplinary mechanisms for conduct eliciting legitimate complaints from clients yet not serious enough to warrant suspension or disbarment. *Id.* at vi-vii ("The system does not address complaints that the lawyer's service was overpriced or unreasonably slow."). *Id.* at vi (The disciplinary system does not address these tens of thousands of [legitimate] complaints annually. The public is left with no practical remedy.). *Id.* at vii ("It is clear that tens of thousands of clients alleging legitimate grounds for dissatisfaction with their lawyer's conduct are being turned away because the conduct alleged would not be a violation of disciplinary rules."). *Id.* at 9 ("Complaints alleging minor neglect or minor incompetence are almost always dismissed. Summary dismissal of these complaints is one of the chief sources of public dissatisfaction with the system."). *Id.* at 36.

33. *Ide, What the ABA Plans to Do*, *supra* note 12, at 65.

34. The quest for a simple and easily understandable body of law, accessible to the common man, is as old as the republic. See Friedman, *supra* note 2, at 403-11 (describing relationship between eighteenth century efforts to make the law "more knowable, harmonious, [and] certain" and later initiatives by the ABA and American Law Institute to unify and simplify law); Hall, *supra* note 2, at 317-25 (discussing nineteenth century codification movement to "reduce all law to a legislatively enacted body of general principles."); GORDON S. WOOD, *THE CREATION OF THE AMERICAN REPUBLIC, 1776-1787*, at 300 (1969) (describing common belief at founding that all "[s]ociety needed [was] '[b]ut a few laws, and these simple, clear, sensible, and easy in their application to the actions of men.'").

35. Erik Hromadka, *ADR in Indiana*, RES GESTAE, Aug. 1993, at 56.

mini-hearings, summary jury trials, private judges, and mediation for some years, and the reactions have been very positive. In areas ranging from standard civil disputes³⁶ to divorces³⁷ to criminal cases,³⁸ parties find greater satisfaction in these simplified proceedings than they do in traditional trials.³⁹

Together with the incentives provided by the market,⁴⁰ these represent useful steps on a long road to restoring the public confidence in lawyering and our legal system. If we stray from this course, both the legal system and the profession are at risk. It should not escape our attention, for example, that in England, the failure of the bar to create cheaper alternatives has resulted in legislation authorizing non-lawyers to represent clients in court.⁴¹ Indeed, in many states the pressure to permit independent legal consultants, paralegals, to provide legal services is increasing just as it has in California.⁴² Lawyers must not forget that the monopoly on lawyering is a twentieth century notion.⁴³

36. See, e.g., Greg Kueterman, *Allen County Judges and Attorneys Rally Around Alternative Dispute Resolution*, INDIANA LAWYER, Dec. 28, 1993, at S6; Alissa J. Stern, *Quake Victims Compensated—Quickly*, NAT'L INST. DISP. RESOL. FORUM, Summer/Fall 1993, at 33.

37. See, e.g., Barbara Vobejda, *Making Divorce as Painless as Possible*, WASH. POST NAT'L WEEKLY ED., July 19-25, 1993, at 33.

38. See, e.g., *Cooling Hot Heads*, INDIANAPOLIS STAR, Nov. 2, 1993, at A6.

39. Despite the seeming success of these programs, there is still some opposition among lawyers to ADR. See, e.g., Barry Nace, *The ADR Debate: Efficiency Before Justice?*, TRIAL, Dec. 1993, at 7.

40. Under pressure from cost-conscious clients, many firms have been forced to augment their traditional hourly rates with alternative billing arrangements, like flat fees, blended rates, and contingency fees. See *Even Lawyers Feel Pinch of Hard Times*, EVANSVILLE COURIER J., Sept. 5, 1993, at C4 (citing *NLJ* survey which found that nearly half of nation's 250 largest law firms reduced legal staffs); Laura Schwarzkopf, *Management Tips: How to Communicate with Clients*, N.J. LAWYER, May 31, 1993, at 15 ("The economy has not allowed rate increases, which leaves the option of creating different billing methods."); Thom Weidlich, *Billing Picture Reveals A Mix of Alternatives*, NAT'L L.J., Dec. 20, 1993, at S1; see also Laura Duncan, *Law Firms Can Expect Revenue Gain This Year*, CHI. DAILY L. BULL., Jan. 19, 1993, at 3 (observing that firms had to make "painful cuts" to remain profitable in the 1990s).

41. The Courts and Legal Services Act of 1990, among other things, breaks the monopoly previously held by barristers on litigating in the higher courts of England. The Act authorizes certain qualified solicitors and even qualified nonlawyers to appear in these courts for first time. The Act further loosens the grip of lawyers on the profession by permitting qualified nonlawyers to probate wills and to provide conveyancing services. Along these same lines, the Act also allows nonlawyer groups, like accounting firms, to provide certain legal services to their clients. For a discussion of these developments and their relation to the American legal system, see Ruth Fleet Thurman, *English Legal System Shake-Up: Genuine Reform or Teapot Tempest?*, 16 B.C. INT'L & COMP. L. REV. 1 (1993).

42. See Bill Ainsworth, *Paralegals Revive Legal Technician Proposal*, RECORDER, Aug. 3, 1992, at 7; Jill Chanen, *Legal Profession Questions Scope of the Expanding Role of Paralegals*, CHI. LAWYER, July 1993, at 4.

43. See, e.g., Randall T. Shepard, *Classrooms, Clinics and Client Counseling*, 18 OHIO N.U. L. REV. 751, 752-53 (1992) (discussing *inter alia* article 7, section 21 of Indiana's 1816 Constitution which read: "Every person of good moral character, being a voter, shall be entitled to admission to practice law in all courts of justice."). For a long time in America having a license to practice law

Mindful of the potential consequences of failing to relieve public frustration, ABA President Ide led the bar in supplementing the public relations campaign with efforts focusing on substantive change.⁴⁴ To this end, Ide organized the Just Solutions Conference series to ensure that the legal system “effectively serves the American citizen in every situation.”⁴⁵ The first meeting dealt largely with matters of client relations, but in December, the Summit on Civil Justice System Improvements considered some of the problems targeted in this Article. Lawyers, judges, lawmakers, business people, and community representatives discussed methods for lowering the cost and increasing the pace of justice through the courts. Six weeks later, state and local leaders looked at ways to improve the criminal justice system, and in March, leaders from the media, government, education, business, and the bar addressed the problems of ethnic and racial bias in the justice system. Finally, these meetings culminated in the Just Solutions Conference in early May, at which ABA leaders met with dozens of community and organization representatives to build a consensus on the most effective means of addressing these problems.

While these steps are encouraging, we have no guarantee that they will continue. Even after President Ide worked for months establishing state justice commissions to address civil justice issues, such as early settlement procedures, case management techniques, and discovery rule modifications,⁴⁶ the board of governors nearly balked at funding the project, upon the advice of President-elect George E. Bushnell, Jr. Only Ide’s last minute push for approval yielded the \$30,000 in “seed money.”⁴⁷ We will have to remain vigilant if we are to sustain the ABA’s commitment to improving the delivery of justice to the American public.

did not confer such a monopoly.

44. The change in the bar’s approach to the public’s discontent is manifest in the statements of ABA President Ide. In September 1993, Ide told lawyers that the “challenge for us [is] to reach out to the public and increase the public’s understanding about the role of lawyers.” He implicitly denied the legitimacy of the public’s concerns, saying that “perceptions don’t always reflect reality,” admitting only that they “must be acknowledged.” Ide, *What the ABA Plans to Do*, *supra* note 12, at 65. By January of this year, Ide was focusing on the legal system itself, emphasizing that “[j]ustice in the United States takes too long, costs too much and is virtually inaccessible and unaffordable for too many Americans.” He went further, exhorting attorneys to take the lead in solving the problems of the justice system “or rightly stand accused of being part of the problem.” Walter R. Mears, *ABA’s Ide Tackles Image Problems*, *LEGAL INTELLIGENCER*, Jan. 7, 1994, at 1.

45. R. William Ide, III, *Gaining Momentum: Efforts to Improve Legal System Are Yielding Positive Results*, *A.B.A. J.*, Apr. 1994, at 6.

46. R. William Ide, III, *Curing an Ailing Justice System*, *NAT’L L.J.*, Aug. 6, 1993, at S1, S9 (describing process forming state justice commissions).

47. James Podgers, *Justice Commission Funding Approved*, *A.B.A. J.*, Apr. 1994, at 114.

IV. UNJUST OUTCOMES AND PUBLIC DISCONTENT

In addition to evaluating procedural aspects of the justice system, the public may rightly measure our performance by the calibre of the outcomes we generate. It would be surprising—and disappointing—to learn that public attitudes towards our legal system are not, in some part, driven by the perceived quality of the product it delivers. Thus, we would do well to entertain the notion that some of the public's frustration emanates from the public's belief that we impose injustices upon society.

Our legal system is the machinery by which our society compels allegiance to its norms. Its dual charge in our constitutional democracy is to effectuate the will of the people while protecting the rights of individuals against the overreaching of transient majorities. Under this arrangement, the majority will occasionally not prevail. In such cases, it becomes the task of the judiciary to remind the majority of our Constitutional commitment to the rights of dissenters. More commonly, however, the community will have its way—laws are enacted, conduct proscribed, schools built, bonds issued—and dissenters are required to acquiesce to the majority's authority to define and effect salubrious conditions according to its vision of a healthy, prosperous, and decent community.

Lawyers and judges should approach with caution their authority to stymie the community's notion of progress. In modern legal culture, however, caution is too often replaced by hubris. We sometimes forget our role as custodians of the community voice and bestow upon the complaints of dissenters a presumption of legitimacy.⁴⁸ What can we say of a legal culture that rhetorically devalues what statistically is and normatively ought to be its primary function: vindication of the efforts of citizens to define the communities in which they live? And, more to the point, does the emergence of this devaluing impulse help explain the declining regard which the public has for our legal institutions?

By way of illustrating the consequences of this attitude, I will mention here our profession's forays into our nation's schools as a good example of the way substantive outcomes influence public attitudes about the legal profession. Schools are the places where society begins to inculcate and empower its newest members, and their success is a matter of considerable interest not only to parents but to the broader public as well. Our legal system has left the public confused about whether the courts mean to be part of the solution to our schools' problems or but another one of their problems.

Take first our use of the Establishment Clause, which the Supreme Court recently held prohibits invocations and benedictions at high school graduations.⁴⁹ The Court's estrangement from those who wish to declare thanks to God for their successes bolsters the perception that lawyers and judges govern

48. At an international conference of judges in 1991, I heard the Chief Justice of Israel declare that vindicating minority views was "the real reason we have courts."

49. *Lee v. Weisman*, 112 S. Ct. 2649 (1992).

for themselves and not for the public at large. Add to this the public's skepticism over the judiciary's twenty-five year long campaign to interject itself into the grading, disciplining, and educating of public school children, and the product is predictable. As in so many other spheres, public dissatisfaction grows with each step judges and lawyers take towards making themselves the middlemen through which various aspects of the educational enterprise must pass.

A. *Religion in the Public Schools*

As the public's concern with drugs and violence in the schools continues to grow, local communities across the country struggle to restore their children's sense of morality.⁵⁰ By and large, the Supreme Court has been swimming in the opposite direction, recently extending its Establishment Clause doctrine in *Lee v. Weisman*⁵¹ to prohibit references at public school graduations to the religious faith underlying the morality that local communities are fighting to recapture. While the courts are sworn to protect the rights of religious dissenters against overbearing majorities, we, as lawyers, must also appreciate the frustration of community leaders and parents when they find that the traditional invocations and benedictions at their children's graduations, practices older than the Fourteenth Amendment, are now unconstitutional abuses.

The *Lee* decision stands at the furthestmost boundary of a constitutional jurisprudence that began in the late 1940s when the Court first applied the Establishment Clause of the First Amendment against the states in *Everson v. Board of Education*.⁵² In *Everson*, the Court upheld a New Jersey law that reimbursed parents for the cost of bus transportation to religious schools, but the opinion included strong dicta that neither the federal nor state governments could "aid one religion, aid all religions, or prefer one religion over another."⁵³ Further, we were told, "[t]he First Amendment has erected a wall between church and state. That wall must be kept high and impregnable. We could not approve the slightest breach."⁵⁴

50. See generally Elsa Brenner, *The Rising Role of Youths in Crime*, N.Y. TIMES, Jan. 30, 1994, § 13WC, at 1 (discussing "growing uneasiness among city officials about the number of youths carrying weapons to school and 'walking the corridors with guns and knives.'"); Linda Eardley, *City Schools 'Gun-Shy' on Tracking Number of Firearms Found*, ST. LOUIS POST-DISPATCH, Feb. 7, 1994, at A1 (discussing increasing problem of student assaults with guns and knives in public schools); *Fixing Broken Schools Policies Needed on Weapons, Charter, Volunteers*, SAN DIEGO UNION-TRIB., Feb. 15, 1994, B6 (discussing San Francisco education summit on violence in public schools).

51. 112 S. Ct. 2649 (1992).

52. 330 U.S. 1 (1947). While *Everson* was the first case to review state action under the Establishment Clause, the Court had previously incorporated both the Free Exercise and the Establishment Clauses in dicta. See *Cantwell v. Connecticut*, 310 U.S. 296, 303 (1940).

53. *Everson*, 330 U.S. at 15.

54. *Id.* at 18.

In the years since *Everson*, this dicta has taken on a life of its own and now largely insulates students from exposure to community religious sentiments.⁵⁵ As Chief Justice Burger feared, the Court has wrongly employed "sweeping utterances on aspects of [the religion clauses of the First Amendment] that seemed clear in relation to the particular cases but have limited meaning as general principles."⁵⁶ Employing the "general principles" of *Everson*, the courts have prohibited public schools from sponsoring non-denominational, voluntary prayers or Bible readings in classrooms,⁵⁷ at assemblies,⁵⁸ at school sporting events,⁵⁹ and at graduations.⁶⁰

Under this onslaught from the bench, is it any wonder that Mississippi erupted late last year when Bishop Knox, a high school principal, was dismissed because he permitted students to read a non-sectarian prayer over the intercom?⁶¹ While the overwhelming majority of students favored the prayer, 490 to 96, the school superintendent, citing *School District v. Schempp*,⁶² felt compelled to fire Knox. The local community rushed to Knox's aid, demanding and finally winning his reinstatement. Frustrated with what they perceived as illegitimate minority control of their religious lives,⁶³ thousands of students across Mississippi staged walkouts and prayer vigils in Knox's support. Parents

55. See, e.g., *Engel v. Vitale*, 370 U.S. 421 (1962) (prohibiting 23-word prayer that read "Almighty God, we acknowledge our dependence upon Thee, and we beg Thy blessings upon us, our parents, our teachers and our Country."); *School Dist. v. Schempp*, 374 U.S. 203 (1963) (prohibiting Bible reading of ten verses); *Wallace v. Jaffree*, 472 U.S. 38 (1985) (prohibiting moment of silence "for meditation or voluntary prayer"); *May v. Cooperman*, 780 F.2d 240 (3d Cir. 1985) (prohibiting one-minute period of silence for quiet and private contemplation or introspection).

56. *Walz v. Tax Comm'n*, 397 U.S. 664, 668 (1970) (upholding property tax exemptions for religious organizations).

57. See cases cited *supra* note 55; see also *Stone v. Graham*, 449 U.S. 39 (1980) (prohibiting posting of Ten Commandments in classrooms); *Ring v. Grand Forks Pub. Sch. Dist. No. 1*, 483 F. Supp. 272 (D.N.D. 1980) (same).

58. See *Collins v. Chandler Unified Sch. Dist.*, 644 F.2d 759 (9th Cir. 1981), *cert. denied*, 454 U.S. 863 (1981) (prohibiting prayers sponsored by student council at school assemblies even where attendance voluntary).

59. See *Doe v. Duncanville Indep. Sch. Dist.*, 994 F.2d 160 (5th Cir. 1993) (upholding preliminary injunction issued against basketball coach for conducting prayers at practice and after games); *Jager v. Douglas County Sch. Dist.*, 862 F.2d 824 (11th Cir. 1989), *cert. denied*, 490 U.S. 1090 (1989) (prohibiting invocations at high school football games).

60. *Lee*, 112 S. Ct. 2649; see also *Lundberg v. West Monona Community Sch. Dist.*, 731 F. Supp. 331 (N.D. Iowa 1989); *Graham v. Cent. Community Sch. Dist.*, 608 F. Supp. 531 (S.D. Iowa 1985); *Sands v. Morongo Unified Sch. Dist.*, 809 P.2d 809 (Cal. 1991), *cert. denied*, 112 S. Ct. 3026 (1992).

61. The prayer read simply: "Almighty God, we ask Your blessings on our parents, our teachers, and our country throughout the day. In Your name we pray. Amen."

62. 374 U.S. 203 (1963).

63. As one exasperated local leader wondered aloud: "Most of the people here, the majority, are Christians. Why do we have to surrender our rights? We're tired of yielding to a tiny minority. What about our rights?" *School-Prayer Ban Proof of Respect*, ATLANTA CONST., Dec. 25, 1993, at A12.

and students rallied at the state capitol, prompting the state House of Representatives to pass a bill that would permit students, not the school, to initiate prayers in school.⁶⁴

A recent Fifth Circuit decision paved the way for the Mississippi bill and for other state initiatives to return prayer to the schools.⁶⁵ In *Jones v. Clear Creek Independent School District*,⁶⁶ the court permitted a class of high school seniors to determine for themselves whether or not their graduation exercises would include a non-sectarian prayer.⁶⁷ The court reasoned in part that religious dissenters attending graduations should not be surprised to find a community's public celebration infused with community values.⁶⁸ The court's appreciation of the importance of public celebrations to the lives of communities has been sorely missed in past Establishment Clause cases.

B. The Courts and School Discipline

More than twenty years after the Court announced its ruling in *Everson*, the federal courts also began a project of importing the requirements of procedural and substantive due process into school playgrounds and principals' offices. In one of the first cases to advance this cause, *Tinker v. Des Moines Independent Community School District*,⁶⁹ a divided Supreme Court held that the First Amendment precluded school officials from interfering with certain symbolic protests conducted in the school house. *Tinker* signaled the crumbling of traditional judicial deference to educators on questions of educational policy⁷⁰ and, observed Justice Black in dissent, "usher[ed] in . . . an entirely new era" in which, he worried, "the courts will allocate to themselves the function of deciding how the pupils' school day will be spent."⁷¹

64. William Booth, *Bring Back School Prayer? That's Rallying Cry in Mississippi*, WASH. POST, Dec. 20, 1993, at A1; *Principal in a School Prayer Dispute Is Reinstated*, N.Y. TIMES, Dec. 17, 1993, at A33.

65. See generally Katia Hetter, *States Move to Allow Prayer in Schools*, WALL ST. J., Aug. 18, 1993, at B6 (discussing new Tennessee law permitting student-initiated prayer at public school events and similar proposed legislation in Alabama and Oklahoma).

66. 977 F.2d 963 (5th Cir. 1992), cert. denied, 113 S. Ct. 2950 (1993).

67. See also *Harris v. Joint Sch. Dist. No. 241*, 821 F. Supp. 638 (D. Idaho 1993) (upholding right of students to determine whether to include prayer in graduation ceremonies); *Albright v. Board of Educ.*, 765 F. Supp. 682 (D. Utah 1991) (upholding student-initiated, nonproselytizing, and nondenominational prayers for secular purpose of solemnizing graduation ceremonies).

68. *Jones*, 977 F.2d at 972 ("By attending graduation to experience and participate in the community's display of support for the graduates, people should not be surprised to find the event affected by community standards. The Constitution requires nothing different.").

69. 393 U.S. 503 (1969).

70. See J. Patrick Mahon, *Ingraham v. Wright: The Continuing Debate Over Corporal Punishment*, 6 J.L. & EDUC. 473, 473 (1977).

71. *Tinker*, 393 U.S. at 515, 517 (Black, J., dissenting).

Six years later in *Goss v. Lopez*,⁷² the Court decided by a five to four margin that the Due Process Clause required that certain procedural safeguards attend even short suspensions from the public schools. The *New York Times* editorialized that *Goss* was a victory for the rights of children over the "image of the school administrator as a benign but infallible autocrat whose edicts can be challenged only at peril of chaos in the schoolhouse."⁷³ Those dissenting in *Goss*, however, warned that the Court was entering a "thicket" in which the judgment of courts would be substituted for that of the "14,000 school boards, and the 2,000,000 teachers who heretofore have been responsible for the administration of the American public school system."⁷⁴ Within a decade, the legal system had succeeded in wresting away from local educators final authority over the propriety of dress codes,⁷⁵ paddlings,⁷⁶ and a host of other school-related issues including grading, promotions, school transfers and exclusions from extracurricular activities.

When these first cases were handed down twenty five years ago, the specter of "chaos in the school house" was viewed as little more than a fatalistic prediction. Today it is widely regarded as a reality.⁷⁷ Along with worrying about whether their students can become proficient enough to compete in a complex world, educators now have more basic concerns, like whether they can keep cocaine and handguns out of the classroom. Frightened parents, teachers, and community leaders have reacted to the increased incidence of school-based violence and vandalism by seeking new methods for maintaining order. Inevitably, however, many of these innovators must reckon with an American legal system that is comprised of judges who admonish principals for being too earnest in efforts to rid their schools of dangerous weapons,⁷⁸ strike down anti-

72. 419 U.S. 565 (1975).

73. *The Rights of Children*, N.Y. TIMES, Jan. 27, 1975, at A24.

74. *Goss*, 419 U.S. at 597, 599 (Powell, J., dissenting).

75. See, e.g., *Breen v. Kahl*, 419 F.2d 1034 (7th Cir. 1969) (long hair), *cert. denied*, 398 U.S. 937 (1970); *Bannister v. Paradis*, 316 F. Supp. 185 (D.N.H. 1970) (blue jeans). But see *Wright v. City of Brighton*, 441 F.2d 447 (5th Cir. 1971) (declining to follow *Breen*).

76. *Ingraham v. Wright*, 430 U.S. 651, 659 n.12, 679 n.47 (1977) (holding that paddling implicates liberty interest of Fourteenth Amendment and reserving question of whether corporal punishment gives rise to independent federal cause of action to vindicate substantive rights under Due Process Clause); see also *Hall v. Tawney*, 621 F.2d 607 (4th Cir. 1980) (holding that certain instances of corporal punishment could violate substantive due process right of bodily security). But see *Hale v. Pringle*, 562 F. Supp. 598 (M.D. Ala. 1983) (denying student recovery for corporal punishment and declining to adopt *Hall* approach to substantive due process).

77. See generally Cindy Loose & Pierre Thomas, 'Crisis of Violence' Becoming Menace to Childhood, WASH. POST, Jan. 2, 1994, at A1 (reporting that "[s]chool suspensions and expulsions are soaring, as are the number of weapons confiscated in schools"); Lawrence F. Rossow, *Administrative Discretion and Student Suspension: A Lion in Waiting*, 13 J.L. & EDUC. 417, 440 (1984) (documenting rapid increase in suspensions in response to discipline crisis).

78. *Washington v. Smith*, 618 N.E.2d 561 (Ill. App. Ct. 1993) (finding an abuse of discretion when school board expelled student for bringing ice pick on school property).

gang initiatives,⁷⁹ and block efforts to deter those who illegally consume drugs and alcohol.⁸⁰ No wonder, then, that many view lawyers as unwelcome spoilers in the effort to improve our nation's youth and schools.⁸¹

Indeed, the bench has been known to block reforms aimed at helping the most endangered youths of all—young black males. The people of Detroit “looked at the statistics on the life chances of African-American males and their lack of performance at every level of the school system and decided that what [they] were doing wasn’t working.”⁸² In 1991, the school board adopted a plan to establish three all-male academies for the inner-city youth.⁸³ Some twelve days before the schools were to open, however, a federal district judge held that excluding girls from the schools would violate the Equal Protection Clause.⁸⁴

Following the successful precedents set by the Harlem Boys Choir, military academies, and parochial schools, the academies were specifically designed to address the problems facing young black males. Of the 170,000 students in the district, 70% are raised by single mothers, leaving most of the boys without positive male role models. Two-thirds of the males enrolled in Detroit schools fail to graduate as compared with a one-third dropout rate among the girls. It

79. *Jeglin v. San Jacinto Unified Sch. Dist.*, 827 F. Supp. 1459 (C.D. Cal. 1993) (holding that ban on clothing identifying professional or college sports teams violated free speech rights of middle schoolers).

80. *Smith v. School of Hobart*, 811 F. Supp. 391 (N.D. Ind. 1993) (holding that reduction in grades for alcohol use during school hours violated substantive due process).

81. See A.E.P. Wall, *Too Many Laws, Not Enough Justice?*, ORLANDO SENTINEL, June 13, 1993, at G3 (linking “collapse of discipline in the public schools . . . with court orders that looked out for [dissenting students]”); Ted Williams, *How to Fix Our Schools*, HOUSTON CHRON., Nov. 14, 1993, (Viewpoints), at 3 (“courts have handcuffed the schools by making it difficult (sometimes impossible) and costly to deal with incorrigible students”); Wendell L. Willkie, *A School Must Have Moral Authority*, WASH. POST, Sept. 13, 1986, at A21 (“courts [must] be wary of second-guessing routine disciplinary decisions so that schools are not precluded from serving as teachers of character”).

82. Isabel Wilkerson, *Detroit's Boys-Only Schools Facing Bias Lawsuit*, N.Y. TIMES, Aug. 14, 1991, at A1 (quoting superintendent of schools, Dr. Deborah McGriff).

83. See, e.g., Amy Harmon, *Three Hundred Rally in Support of All-Male Schools*, L.A. TIMES, Aug. 22, 1991, at A4; Wilkerson, *supra* note 82, at A1. While Detroit would have been the first city to successfully implement an all-male program, the idea of Afrocentric schools targeting males began in Milwaukee, but a ruling by the Department of Education thwarted that effort. Michael John Weber, *Immersed in an Educational Crisis: Alternative Programs for African-American Males*, 45 STAN. L. REV. 1099, 1100 n.8 (1993); see also Dennis Kelly, *Judge Rejects All-Male Schools*, USA TODAY, Aug. 16, 1991, at 3A. The Department of Education also put a stop to all-male classes in Miami. Weber, *supra*, at 1100 n.7; see also Kenneth J. Cooper, *Bush, Citing Boy Scouts, Backs All-Boy Black Public Schools*, WASH. POST, Sept. 10, 1991, at A2. New York City still plans two such schools, the Ujamaa Institute for Hispanics and African-Americans and the Leadership School for Hispanics. The New York Civil Rights Coalition, however, has filed discrimination complaints against the schools, and the Department of Education is investigating. Susan Chira, *Rethinking Deliberately Segregated Schools*, N.Y. TIMES, July 11, 1993, § 4, at 20.

84. *Garrett v. Board of Educ.*, 775 F. Supp. 1004 (E.D. Mich 1991).

is not surprising, however, that these boys are less concerned with graduation than survival when homicide is the leading cause of death for male youths between the ages of fifteen and twenty-four.⁸⁵ The boys are the gang members. The boys are the discipline problems.⁸⁶ The boys are the ones most at risk today in our cities.

In an effort to break this cycle of violence, drugs, and unemployment, the schools would have employed specially trained male teachers, providing much needed positive role models for the kids. To raise the self-esteem of the children, the curriculum would have emphasized black achievement.⁸⁷ Classes would have been held on Saturdays and additional tutoring would have been available.⁸⁸ For the first time in years, the Detroit community felt it might give its boys a chance to rise above their circumstances.⁸⁹

In granting the injunction against the schools, Judge Woods did not deny that saving the black males of Detroit was an important objective nor did he question the seriousness of the difficulties facing these kids. Instead, he declared that excluding girls was not substantially related to the achievement of that objective.⁹⁰ He reasoned that "[a]lthough co-educational programs have failed, there is no showing that it is the co-educational factor that results in failure."⁹¹ Of course this reasoning placed Detroit in a catch-22. The courts will not permit

85. Weber, *supra* note 83, at 1099 n.2.

86. Wilkerson, *supra* note 82, at A1.

87. "Our kids are given the impression that all they can do is dance and play sports. White kids are taught they can do anything. When a little kindergartner [sic] looks at a traffic light, we need to go beyond red, yellow and green. The teacher needs to say a black man, Garrett Morgan, designed that," explains Dr. Clifford Watson, principal of one of the schools. Wilkerson, *supra* note 82, at A1. For a discussion of Afrocentric curriculums, see Weber, *supra* note 83, at 1102-21.

88. Garrett, 775 F. Supp. at 1006; *see also* Harmon, *supra* note 83, at A4; Wilkerson, *supra* note 82, at A1.

89. Chira, *supra* note 83, at 20 (discussing support for voluntary segregation given public schools' "abysmal" record at educating minorities); Harmon, *supra* note 83, at A4 (describing support from those "desperate to stop the steady stream of [Detroit's] young men flowing into prisons and onto the streets"); Wilkerson, *supra* note 82, at A1 ("We've just got to do something to turn this madness around," explained Frank Jayden, vice president of Detroit Board of Education).

90. Garrett, 775 F. Supp. at 1006-08. In *Mississippi Univ. for Women v. Hogan*, the Court announced that students may not be excluded from publicly funded schools on the basis of gender unless the state can show that the exclusion "serves 'important governmental objectives and that the discriminatory means employed' are 'substantially related to the achievement of those objectives.'" 458 U.S. 718, 724 (1982) (holding that men could not be excluded from school of nursing). The Court did not decide, however, separate but equal all-male and all-female schools would violate the holding of *Brown v. Board of Education*, 347 U.S. 483, 495 (1954) (holding that separate but equal schools for African-Americans are "inherently unequal"). *Hogan*, 458 U.S. at 720 n.1; Garrett, 775 F. Supp. at 1006 n. 4; *see also* United States v. Virginia, 976 F.2d 890, 900 (4th Cir. 1992) (holding that single-sex policy at Virginia Military Institute violated equal protection but expressly suggesting establishment of comparable programs for women).

91. Garrett, 775 F. Supp. at 1007.

all-male academies absent evidence that they will work, but communities cannot produce such evidence without first establishing an academy.⁹²

There is some indication, however, that the Court is attempting to extricate itself from the "thicket" of which Justice Powell warned.⁹³ These moves are animated by judicial concern for the plight of the nation's schools⁹⁴ and a belief that the explosion of suits by students and their parents against schools must be checked.⁹⁵ Even so, the volatility of due process jurisprudence⁹⁶ coupled with the eagerness of many lower courts to entertain these suits (and of lawyers to bring them) ensures that actual or threatened legal actions will continue to chill efforts of local authorities.⁹⁷ And, as long as the legal system is viewed as an obstacle which those concerned about education must overcome,⁹⁸ we should

92. Weber, *supra* note 83, at 1124 (arguing that "[u]nless the courts allow experimentation, heterogeneous school districts will be unable to determine whether all-male African-American schools can work").

93. See, e.g., *Bethel Sch. Dist. v. Fraser*, 478 U.S. 675 (1986) (holding that students not permitted same latitude as adults to use offensive expression to make "political" point); *New Jersey v. T.L.O.*, 469 U.S. 325 (1985) (exempting searches and seizures by school officials from warrant requirement but holding them to reasonableness standard). See generally Andrew Fegelman, *Kids' Rights Fade Behind School Doors*, CHI. TRIB., Dec. 26, 1991, at NW1; Michael A. Mass, *Due Process Rights of Students: Limitations on Goss v. Lopez—A Retreat Out of the 'Thicket,'* 9 J.L. & EDUC. 449 (1980).

94. See, e.g., *T.L.O.*, 469 U.S. at 339 ("Maintaining order in the classroom has never been easy, but in recent years, school disorder has often taken particularly ugly forms: drug use and violent crime in the schools have become major social problems."). See generally J.M. Sanchez, *Expelling the Fourth Amendment from American Schools: Students' Rights Six Years After T.L.O.*, 21 J.L. & EDUC. 381, 409 (1992); Frederick J. Griffith, III, *New Jersey v. T.L.O. and its Progeny: The Bill of Rights at School*, 5 COOLEY L. REV. 617 (1988).

95. Griffith, *supra* note 94.

96. See *Wood v. Strickland*, 420 U.S. 308, 329 (1975) (Powell, J., concurring in part and dissenting in part) ("One need only look to the decisions of this Court—to our reversals, our recognition of evolving concepts, and our five-to-four splits—to recognize the hazard of even informed prophecy as to what are unquestioned constitutional rights.").

97. See Andree Aelion Brooks, *Parents v. Schools: Battling in Courts*, N.Y. TIMES, Aug. 1, 1993, §4 (Education), at 22 (tracing "sharp increase" in lawsuits against schools in part to the U.S. Supreme Court's opinion in *Goss v. Lopez*); Donald H. Henderson, *Constitutional Implications Involving the Use of Corporal Punishment in the Public Schools: A Comprehensive Review*, 15 J.L. & EDUC. 255 (1986) (reporting that increasing number of corporal punishment litigants choose to pursue federal civil rights remedies over state common law ones); Bernard Weinraub, *Reagan Orders Meese to Examine Ways to Curb Violence in Schools*, N.Y. TIMES, Mar. 1, 1985, at B9 (reporting administration's concern about "'the likely chilling effect' on teachers of actual or threatened legal moves brought by students facing disciplinary action").

98. See, e.g., Doris Sue Wong, *Bill OK'd Giving Schools More Power To Bar Pupils*, BOSTON GLOBE, Jan. 5, 1994, at 23 (parent petition drive secures passage of bill nullifying court ruling that school administrators lacked authority to discipline students for activities beyond school grounds); Rossow, *supra* note 77, at 440 (warning that "[r]egardless of how carefully an administrator follows procedural due process guidelines," suspensions can be successfully challenged if the decision to suspend a student for a particular misbehavior is deemed unreasonable by the court).

not be surprised at the disdain with which those who administer the legal system are held by the public.

V. CONCLUSION

I find myself at once pessimistic and optimistic about the future role of our profession in this country. The pessimism flows from realizing that lawyers have been the object of criticism for centuries, a glum reality which will not be radically altered by any public relations effort. Moreover, substantive legal reform is a hard chore indeed; changing the legal system is at least as difficult as moving a cemetery. Still, I see signs warranting hope. In the last year, the leadership of the American Bar Association has taken us a long way towards confronting the root causes of public dissatisfaction with our profession and the role it plays in American society. Whether this fine turn of events can be converted into a sustained effort, at the ABA and elsewhere in the profession, will depend on how many of us step up to do our part.

AN EXAMINATION OF THE INDIANA SUPREME COURT DOCKET, DISPOSITIONS, AND VOTING IN 1993*

KEVIN W. BETZ**

ANDREW T. DEIBERT***

This is the third annual examination of the Indiana Supreme Court's docket, dispositions, and voting. It is apparent from this year's review that the court has finished a period of transition from the days of direct criminal appeals clogging the court's docket to a more stable apportionment of dispositions under its modern jurisdiction.¹

During the past two years (1992 and 1993), the court's docket has been very similar: sixty-five compared to fifty-six opinions on petitions to transfer of civil cases; five to four direct appeals of civil cases; twenty-eight to twenty-one opinions on petitions to transfer of criminal matters; and fifty-eight to fifty-six direct appeals of criminal matters. One hundred eighty-five opinions were issued by the court in 1992 and 202 in 1993, including matters under the court's original jurisdiction, such as writs of mandamus or prohibition, attorney or judicial discipline cases, and certified questions.

Now that the new era is here, the present differs from the past in that there are far more opinions on petitions to transfer of civil matters.² This is primarily

* The Tables presented in this Article are patterned after the annual statistics of the United States Supreme Court published in the Harvard Law Review. An explanation of the origin of these Tables can be found at Louis Henkin, *The Supreme Court, 1967 Term*, 82 HARV. L. REV. 63, 301 (1968). The *Harvard Law Review* granted permission for the use of these Tables by the *Indiana Law Review* this year; however, permission for any further reproduction of these Tables must be obtained from the *Harvard Law Review*.

** Associate, Krieg DeVault Alexander & Capehart, Indianapolis. Law Clerk for Chief Justice Randall T. Shepard, Indiana Supreme Court, 1988-1990. B.A., 1982, Indiana University; M.S., 1984, Northwestern University; J.D., 1988, Indiana University School of Law—Bloomington. We thank Krieg DeVault Alexander & Capehart for its gracious willingness to devote the time, energy, and resources of its law firm to allow such a project as this to be accomplished. As is appropriate, credit for the idea for this project goes to Chief Justice Shepard, but, of course, any errors or omissions belong to his former law clerk.

*** Paralegal, Krieg DeVault Alexander & Capehart, Indianapolis. B.A., 1975, Wittenberg University.

1. See Chief Justice Randall T. Shepard, *Changing the Constitutional Jurisdiction of the Indiana Supreme Court: Letting a Court of Last Resort Act Like One*, 63 IND. L.J. 669 (1988); see also Randall T. Shepard, *Foreword: Indiana Law, the Supreme Court, and a New Decade*, 24 IND. L. REV. 499 (1991); Randall T. Shepard, *The New Indiana Supreme Court*, 35 RES GESTAE 341 (1992); George T. Patton, Jr., *Recent Developments in Indiana Appellate Procedure: Reforming the Procedural Path to the Indiana Supreme Court*, 25 IND. L. REV. 1105 (1992); Kevin W. Betz, *An Examination of the Indiana Supreme Court Docket, Dispositions, and Voting in 1992*, 26 IND. L. REV. 691 (1993).

2. In 1984, the court only wrote 19 opinions on 239 petitions to transfer of civil matters. In 1989, the court wrote 40 such opinions out of 304 petitions to transfer civil cases, and in 1993

because the court has cleared its backlog. It is also an indication that the court now has more time to consider the matters and cases that come before it.³ The court also handed down fifty-seven attorney discipline opinions or orders in 1993 compared to only twenty in 1992 and nine in 1991. Although twenty of these attorney discipline matters were in order form, thirty-seven were full opinions. This is primarily because of a more energetic Disciplinary Commission⁴ and more room on the court's docket.

These trends provide an insight about the court that cannot be over-emphasized to the practitioner: The Indiana Supreme Court is a court that now thinks of itself as a "law-giving" court and not an "error-correcting" court.⁵ The implications of this new self-perception are significant and include the fundamental precept that an argument before the Indiana Supreme Court should be based less on the applicable rule of law and more on the rationale underlying the applicable rule of law and its appropriateness for this State.

there were 60 out of 280 petitions. See SUPREME COURT OF INDIANA PROGRESS REPORT, 1984, 1989, 1993.

3. "One of the really healthy changes of the last few years is that the court has increased pretty dramatically the amount of time that the five justices sit in a room together and debate a particular appeal," according to Chief Justice Shepard. See Eric Hromadka, *Indiana Supreme Court Shapes State's Practice of Law*, 37 RES GESTAE 407 (Mar. 1994).

4. See *Indiana Supreme Court Disciplinary Commission Annual Report* 37 RES GESTAE 365 (Feb. 1994).

5. Kimberly A. Bradford, Administrator of the Indiana Supreme Court, provided a list at a March, 1994 ICLEF Seminar, titled: *How Do You Pique the Interest of the Indiana Supreme Court?* It listed areas likely to attract the court's attention and areas unlikely to do so. The subjects listed which "often attract" the court's attention were:

- State constitutional questions, particularly if they relate to a subject on which the federal constitution is most often cited
- Questions of first impression in any area
- Family law questions
- Environmental cases
- Cases which question the interpretation of trial rules
- Comparative fault because it is a relatively new area of the law
- U.C.C. cases
- Tort immunity
- Cases which clearly fall within IND. APP. R. 4(A)(9)
- Cases which will educate the bar about a particular area of law

The subjects unlikely to attract the court's attention were:

- Cases with conflicting facts and discretionary calls by the trial court which have been affirmed by the Court of Appeals
- Cases which duplicate arguments previously rejected by the current Court
- Cases which are poorly briefed
- Cases where the record is inadequate
- Cases where error by the lower courts did not change the result or confuse the law

Other than an understanding of the court's overall work, this examination also provides the voting behavior of individual justices. The following is a brief description of the highlights from each Table.

Table A. The court issued 182 opinions in 1993, exclusive of twenty attorney discipline orders, which, like an opinion, require a three-justice majority vote, but are not issued with a full discussion of the court's reasoning. This number of opinions is comparable to the 185 opinions handed down in 1992. The court again in 1993 wrote on more civil issues than criminal with seventy-nine criminal opinions and 103 civil opinions.

Justice Givan was the author of the most opinions: thirty-six criminal and nine civil. Justice Krahulik, who left the court in November, wrote the second most opinions overall and the highest number of civil opinions—twenty. The greatest increase was in the number of per curiam opinions—from twenty-seven in 1992 to forty-six in 1993, primarily because of the increase in attorney discipline opinions.

As usual, Justice Givan wrote the most dissents with thirty-five, but tied with Justice Dickson for the most dissents in civil matters with sixteen. This is a large increase for Justice Dickson who wrote only four dissents in civil cases in 1992. Justice Dickson wrote the second most dissents overall in 1993 with twenty-four, after dissenting only nine times in 1992 and eleven times in 1991. Justice DeBruler was the third most dissenting justice with twenty-one and was the author of the highest number of concurrences in 1993, with eleven.

Table B-1. Justices Krahulik and Shepard were the two justices most aligned in civil cases with a 92.4% agreement percentage. Justices Givan and DeBruler had been the least aligned in the past, but in 1993 Justices Givan and Dickson were the least aligned, with an agreement percentage of 73.2%. Whereas Justices Givan and DeBruler's alignment jumped from 58.8% in 1992 to 87.9% in 1993.

Justice Dickson was also the least aligned with all justices, on average, at 79.4%. Last year, he was one of the most aligned. Another change was that Justice DeBruler was the most aligned on average at 88.8%. Overall, the Court's average alignment was 84.2% in civil cases.

Table B-2. In criminal matters, Justices Shepard and Krahulik were again the two most aligned at 95.7%. As usual, Justices Givan and DeBruler were the least aligned on criminal cases at 58.2%. Interestingly, Justice Givan, who wrote the most criminal opinions, was also the least aligned with fellow justices on average at 69.8% in criminal cases. This alignment is achievable because of the high number of direct criminal appeals—in which the court is usually unanimous—authored by Justice Givan. Justices Shepard and Krahulik were also the most aligned with fellow justices on average at 86.5% and 86.7%, respectively. Overall, the court was aligned on average 81.3% in criminal cases.

Table B-3. For all cases, the two most aligned were Justices Shepard and Krahulik at 93.7%. Justices Dickson and Givan were the least aligned at 71.2%, just behind Justices DeBruler and Givan at 76.2%. The most aligned with all

justices were Shepard and Krahulik at 86.6% and 86.2%, respectively. Justice Givan was the least aligned at 76%. Overall, the court was aligned on average 83.4% in all cases.

Table C. The court was unanimous or had a concurrence in about 60% of its opinions, a record similar to past years. The court had at least one dissent in 39.6% of its opinions which is also similar to past years.

Table D. The court has consistently had about twenty-five of its opinions each year turn on a 3-2 vote. This year twenty-four were split opinions with Justices Shepard and Krahulik each being part of the three-justice majority in eighteen cases. They were followed by Justice Givan who was in the majority fourteen times. He authored the most 3-2 opinions at nine. Justice Dickson was in the majority of split opinions the least number of times at nine. Whereas, in 1991 Justice Dickson was in the majority of split opinions more than any other justice.

Table E. In 1993, the court wrote 137 opinions on cases coming from a trial court or the court of appeals. The Court handled sixty-five other cases under its original jurisdiction. It ruled on fifty-seven attorney discipline cases, and issued opinions in four writs of mandamus or prohibition, three certified questions, and one court reporter discipline matter.

Overall, the trial court or court of appeals was affirmed 42% of the time by the Supreme Court, and either reversed or vacated, at least in part, in 58% of the cases. If a petition to transfer of a civil case was granted, the case was reversed or vacated at least in part about 86% of the time in 1993. As for criminal cases on transfer, the court reversed or vacated the ruling in 80% of these cases while doing so only 20% of the time in direct appeals of criminal matters.⁶

Table F. The court had a large increase in its attorney discipline case load. It also handled four corporate law cases. Previously, it has seldom written in this area. The court also continues to show interest in the Indiana Constitution with ten cases in this area. The court reviewed six cases in which the death penalty was imposed, affirming three and reversing three. For the first time in three years, and after affirming all eleven previous transferred cases from the Tax Court, the court reversed a case from the Tax Court.

6. According to the 1993 SUPREME COURT OF INDIANA PROGRESS REPORT, the court acted upon 280 petitions to transfer of civil matters, denying or dismissing 218 (78%) while assigning 61 (22%) for opinions in 1993. For petitions to transfer of criminal cases, the court acted upon 300, denying or dismissing 274 (91%) and assigning 24 (8%) for opinions. The court also conducted 21 oral arguments in 1993.

TABLE A

OPINIONS^a

	OPINIONS OF COURT ^b			CONCURRENCES ^c			DISSENTS ^d		
	Criminal	Civil	Total	Criminal	Civil	Total	Criminal	Civil	Total
Shepard, C.J.	12	15*	27	1	4	5	2	4	6
DeBruler	9	3*	12	8	3	11	13	8	21
Givan	36	9	45	0	1	1	19	16	35
Dickson	8	12	20	3	1	4	8	16	24
Krahulik ^e	11	20	31	2	0	2	1	4	5
Sullivan ^e	0	1	1	0	0	0	0	1	1
per curiam	3	43	46	---	---	---	---	---	---
Total	79	103	182	14	9	23	43	49	92

^a These are opinions and votes on opinions by each justice and in per curiam in the 1993 term. The Indiana Supreme Court is unique because it is the only supreme court to assign each case to a justice by a consensus method. Cases are distributed by a consensus of the justices in the majority on each case either by volunteering or nominating writers. The Chief Justice does not have any power to control the assignments other than as a member of the majority. See Melinda Gann Hall, *Opinion Assignment Procedures and Conference Practices in State Supreme Courts*, 73 JUDICATURE 209 (1990). The order of discussion and voting is started by the most junior member of the court and follows reverse seniority. *Id.* at 210.

^b Plurality opinions that announce the judgment of the court are counted as opinions of the court. This is only a counting of full opinions written by each justice. It includes opinions on civil, criminal, and original actions and disciplinary matters. It does not include rehearing opinions, nor does it include the per curiam opinions given credit to each justice by the SUPREME COURT OF INDIANA PROGRESS REPORT. The per curiam opinions are released publicly with no justice named as the author, but the Report gives credit to the justice who actually wrote the opinion. For the purposes of this Table, per curiam opinions are not counted for an individual justice because the public has no method of knowing which justice wrote the opinion.

^c This includes both written concurrences and votes to concur in result only.

^d This includes both written dissents and votes to dissent without opinion. Opinions concurring in part and dissenting in part or opinions concurring in part only and differing on another issue are counted as dissents.

^e Former Justice Krahulik left the court on November 1, 1993, and Justice Sullivan joined the court on the same day. Justice Krahulik did not participate in two opinions. *Riggs v. Burell*, 619 N.E.2d 562 (Ind. 1993); *Indiana Carpenters Pension v. Seaboard Sur.*, 615 N.E.2d 892 (Ind. 1993). Justice Sullivan did not participate in four opinions. *In re E.H.*, 624 N.E.2d 471 (Ind. 1993); *In re Coffey*, 624 N.E.2d 465 (Ind. 1993); *In re Oates*, 624 N.E.2d 469 (Ind. 1993); *In re Schumate*, 626 N.E.2d 459 (Ind. 1993).

* In addition, Chief Justice Shepard signed 18 orders of Attorney Discipline. Justice DeBruler signed two orders of Attorney Discipline. These orders, however, are included in other Tables because they are matters upon which the entire court votes and members write dissents or concurrences.

TABLE B-1
VOTING ALIGNMENTS FOR CIVIL CASES^f

		Krahulik	Dickson	Givan	DeBruler	Shepard	Sullivan
Shepard	O	96	98	102	109		10
	S	1	1	2	1		0
	D	97	99	104	110		10
	N	105	123	123	123	---	12
	P	92.4%	73.2%	84.5%	89.4%		83.3%
DeBruler	O	93	105	107		109	9
	S	0	5	1		1	0
	D	93	110	108		110	9
	N	105	123	123	---	123	12
	P	88.6%	89.4%	87.9%		89.4%	75.0%
Givan	O	85	89		107	102	11
	S	0	1		1	2	0
	D	85	90		108	104	11
	N	105	123	---	123	123	12
	P	81.0%	73.2%		87.9%	84.5%	91.7%
Dickson	O	86		89	105	98	9
	S	0		1	5	1	2
	D	86		90	110	99	11
	N	105	---	123	123	123	12
	P	82.0%		73.2%	89.4%	73.2%	91.7%
Krahulik	O		86	85	93	96	
	S		0	0	0	1	
	D		86	85	93	97	
	N	---	105	105	105	105	---
	P		82.0%	81.0%	88.6%	92.4%	
Sullivan	O		9	11	9	10	
	S		2	0	0	0	
	D		11	11	9	10	
	N	---	12	12	12	12	---
	P		91.7%	91.7%	75.0%	83.3%	

^f This Table records the number of times that one justice voted with another in full-opinion decisions, including per curiam, for only civil cases. Two justices are considered to have agreed whenever they joined the same opinion, as indicated by either the reporter or the explicit statement of a justice in the body of his or her own opinion. The Table does not treat two justices as having agreed if they did not join the same opinion, even if they agreed only in the result of the case or wrote separate opinions revealing little philosophical disagreement.

"O" represents the number of times that the two justices agreed in opinions of the court or opinions announcing the judgment of the court.

"S" represents the number of times the two justices agreed in separate opinions, including agreements in both concurrences and dissents.

"D" represents the number of decisions in which the two justices agreed in either a majority, dissenting, or concurring opinion.

"N" represents the number of decisions in which both justices participated and thus the number of opportunities for agreement.

"P" represents the percentage of decisions in which one justice agreed with another justice, calculated by dividing "D" by "N."

TABLE B-2
VOTING ALIGNMENTS FOR CRIMINAL CASES^g

		Krahulik	Dickson	Givan	DeBruler	Shepard	Sullivan
Shepard	O	67	69	60	67		8
	S	0	0	1	1		0
	D	67	69	61	68		8
	N	70	79	79	79	---	9
	P	95.7%	87.3%	77.2%	86.0%		88.8%
DeBruler	O	57	65	46		67	8
	S	3	5	0		1	0
	D	60	70	46		68	8
	N	70	79	79	---	79	9
	P	85.7%	88.6%	58.2%		86.0%	88.8%
Givan	O	53	53		46	60	5
	S	0	1		0	1	1
	D	53	54		46	61	6
	N	70	79	---	79	79	9
	P	75.7%	68.3%		58.2%	77.2%	66.6%
Dickson	O	62		53	65	69	8
	S	1		1	5	0	0
	D	63		54	70	69	8
	N	70	---	79	79	79	9
	P	90.0%		68.3%	88.6%	87.3%	88.8%
Krahulik	O		62	53	57	67	
	S		1	0	3	0	
	D		63	53	60	67	
	N	---	70	70	70	70	---
	P		90.0%	75.7%	85.7%	95.7%	
Sullivan	O		8	5	8	8	
	S		0	1	0	0	
	D		8	6	8	8	
	N	---	9	9	9	9	---
	P		88.8%	66.6%	88.8%	88.8%	

^g This Table records the number of times that one justice voted with another in full-opinion decisions, including per curiam, for all cases. Two justices are considered to have agreed whenever they joined the same opinion, as indicated by either the reporter or the explicit statement of a justice in the body of his or her own opinion. The Table does not treat two justices as having agreed if they did not join the same opinion, even if they agreed only in the result of the case or wrote separate opinions revealing little philosophical disagreement.

- "O" represents the number of times that the two justices agreed in opinions of the court or opinions announcing the judgment of the court.
- "S" represents the number of times the two justices agreed in separate opinions, including agreements in both concurrences and dissents.
- "D" represents the number of decisions in which the two justices agreed in either a majority, dissenting, or concurring opinion.
- "N" represents the number of decisions in which both justices participated and thus the number of opportunities for agreement.
- "P" represents the percentage of decisions in which one justice agreed with another justice, calculated by dividing "D" by "N."

TABLE B-3
VOTING ALIGNMENTS FOR ALL CASES^h

		Krahulik	Dickson	Givan	DeBruler	Shepard	Sullivan
Shepard	O	163	167	162	176		18
	S	1	1	3	2		0
	D	164	168	165	178		18
	N	175	202	202	202	---	21
	P	93.7%	83.1%	81.6%	88.1%		85.7%
DeBruler	O	150	170	153		176	17
	S	3	10	1		2	0
	D	153	180	154		178	17
	N	175	202	202	---	202	21
	P	87.4%	89.1%	76.2%		88.1%	80.9%
Givan	O	138	142		153	162	16
	S	0	2		1	3	1
	D	138	144		154	165	17
	N	175	202	---	202	202	21
	P	78.8%	71.2%		76.2%	81.6%	80.9%
Dickson	O	148		142	170	167	17
	S	1		2	10	1	2
	D	149		144	180	168	19
	N	175	---	202	202	202	21
	P	85.1%		71.2%	89.1%	83.1%	90.5%
Krahulik	O		148	138	150	163	
	S		1	0	3	1	
	D		149	138	153	164	
	N	---	175	175	175	175	---
	P		85.1%	78.8%	87.4%	93.7%	
Sullivan	O		17	16	17	18	
	S		2	1	0	0	
	D		19	17	17	18	
	N	---	21	21	21	21	---
	P		90.5%	80.9%	80.9%	85.7%	

^h This Table records the number of times that one justice voted with another in full-opinion decisions, including per curiam, for all cases. Two justices are considered to have agreed whenever they joined the same opinion, as indicated by either the reporter or the explicit statement of a justice in the body of his or her own opinion. The Table does not treat two justices as having agreed if they did not join the same opinion, even if they agreed only in the result of the case or wrote separate opinions revealing little philosophical disagreement.

"O" represents the number of times that the two justices agreed in opinions of the court or opinions announcing the judgment of the court.

"S" represents the number of times the two justices agreed in separate opinions, including agreements in both concurrences and dissents.

"D" represents the number of decisions in which the two justices agreed in either a majority, dissenting, or concurring opinion.

"N" represents the number of decisions in which both justices participated and thus the number of opportunities for agreement.

"P" represents the percentage of decisions in which one justice agreed with another justice, calculated by dividing "D" by "N."

TABLE C

UNANIMITYⁱ

Unanimous ^j			Unanimous With Concurrence ^k			Opinions With Dissent			Total
Criminal	Civil	Total	Criminal	Civil	Total	Criminal	Civil	Total	
34	74	108 (53.4 %)	9	5	14 (6.9%)	36	44	80 (39.6%)	202

ⁱ This Table tracks the number and percent of unanimous opinions among all opinions written. If, for example, only four justices participate and concur, it is still considered unanimous. It also tracks the percent of opinions with concurrence and opinions with dissent.

^j A decision is considered unanimous only when all justices participating in the case voted to concur in the court's opinion as well as its judgment. When one or more justices concurred in the result but not in the opinion, the case is not considered unanimous.

^k A decision is listed in this column if one or more justices concurred in the result but not in the opinion of the court or wrote a concurrence, and there were no dissents.

TABLE D

3-2 DECISIONS¹

Justices Constituting the Majority	Number of Opinions ^m
1. Shepard, DeBruler, Givan	3
2. Shepard, DeBruler, Dickson	1
3. Shepard, DeBruler, Krahulik	2
4. Shepard, Givan, Dickson	1
5. Shepard, Givan, Krahulik	9
6. Shepard, Dickson, Krahulik	1
7. DeBruler, Givan, Krahulik	1
8. DeBruler, Dickson, Krahulik	3
9. Givan, Dickson, Krahulik	2
10. Givan, DeBruler, Dickson	1
Totalⁿ	24

¹ This Table concerns only decisions rendered by full opinion. An opinion is counted as a 3-2 decision if two justices voted to decide the case in a manner different from that of the majority of the court. The order of the justices' names is based on the tradition of the court, which is placing the Chief Justice first and then following the seniority of the justices.

^m This column lists the number of times each three-justice group constituted the majority in a 3-2 decision. (Justice Sullivan did not join in any three-justice majority.)

ⁿ The 1993 term's 3-2 decisions were:

1. **Shepard, DeBruler, Givan:** *Brewer v. State*, 605 N.E.2d 181 (Ind. 1993) [Givan]. *In re Gary McPheeters*, 1993 Ind. Lexis 207 (Ind. 1993) [per curiam]. *In re Zumrun*, 1993 Ind. Lexis 211 (Ind. 1993) [Shepard].
2. **Shepard, DeBruler, Dickson:** *Wickizer v. State*, 1993 Ind. Lexis 205 (Ind. 1993) [Dickson].
3. **Shepard, DeBruler, Krahulik:** *Miller Brewing v. Best Beers*, 608 N.E.2d 975 (Ind. 1993) [Krahulik]; *Price v. State*, 622 N.E.2d 954 (Ind. 1993) [Shepard].
4. **Shepard, Givan, Dickson:** *Dausch v. State*, 616 N.E.2d 13 (Ind. 1993) [Dickson].
5. **Shepard, Givan, Krahulik:** *McCaslin v. Insurance Co. of State of Pa.*, 605 N.E.2d 760 (Ind. 1993) [Givan]; *Clemens v. State*, 610 N.E.2d 236 (Ind. 1993) [Givan]; *Cash v. State*, 610 N.E.2d 228 (Ind. 1993) [Givan]; *Hawkins v. Auto-Owners Ins. Co.*, 608 N.E.2d 1358 (Ind. 1993) [Givan]; *City of Gary, v. Allstate Ins.*, 612 N.E.2d 115 (Ind. 1993) [Krahulik]; *In re Estate of Chiesi v. First Citizens Bank N.A.*, 613 N.E.2d 14 (Ind. 1993) [Shepard]; *Magers v. State*, 621 N.E.2d 323 (Ind. 1993) [Givan]; *Walker v. State*, 621 N.E.2d 627 (Ind. 1993) [Givan]; *Reed v. Central Soya*, 621 N.E.2d 1069 (Ind. 1993) [Krahulik].
6. **Shepard, Dickson, Krahulik:** *Kelly v. Smith*, 611 N.E.2d 118 (Ind. 1993) [Krahulik].
7. **DeBruler, Givan, Krahulik:** *In re Withers*, 619 N.E.2d 923 (Ind. 1993) [per curiam].
8. **DeBruler, Dickson, Krahulik:** *Kenney v. State*, 620 N.E.2d 17 (Ind. 1993) [Krahulik]; *La Pulme, v. Romero*, 621 N.E.2d 1102 (Ind. 1993) [DeBruler]; *Quakenbush v. Lackey*, 622 N.E.2d 1284 (Ind. 1993) [Krahulik].
9. **Givan, Dickson, Krahulik:** *Office of Utility Consumer Counselor v. PSI*, 608 N.E.2d 1362 (Ind. 1993) [Dickson]; *McConz v. State*, 622 N.E.2d 504 (Ind. 1993) [Givan].
10. **Givan, DeBruler, Dickson:** *State ex rel. Masariu v. Marion Superior Court*, 621 N.E.2d 1097 (Ind. 1993) [Givan].

TABLE E
DISPOSITION OF CASES REVIEWED BY TRANSFER
AND DIRECT APPEALS^o

	Reversed		Vacated ^P		Affirmed	Total
Civil Opinions Accepted for Transfer	11	(19.6%)	37	(66.1%)	8 (14.3%)	56
Direct Civil Appeals	3	(75.0%)	1	(25.0%)	0 (0.0%)	4
Criminal Opinions Accepted for Transfer	6	(28.6%)	11	(52.4%)	4 (19.0%)	21
Direct Criminal Appeals	9	(16.1%)	2	(3.6%)	45 (80.3%)	56
Total	29	(21.2%)	51	(37.2%)	57 (42.0%)	137 ^q

^o Direct criminal appeals are cases in which the trial court imposed a sentence of greater than 50 years. *See* IND. CONST. art. 7, § 4. Thus, direct criminal appeals are those directly from the trial court. A civil appeal may also be direct from the trial court. *See* IND. APP. R. 4(A). All other Indiana Supreme Court opinions are accepted for transfer from the Indiana Court of Appeals. *See* IND. APP. R. 11(B). The court's transfer docket, especially civil cases, has substantially increased in the past four years. *See* Chief Justice Randall T. Shepard, *Indiana Law, the Supreme Court, and a New Decade*, 24 IND. L. REV. 499 (1991).

^P Generally, the term "vacate" is used by the Indiana Supreme Court when it is reviewing a court of appeals opinion, while the term "reverse" is used when the court overrules a trial court decision. A point to consider in reviewing this Table is that the court technically "vacates" every court of appeals opinion that is accepted for transfer, but may only disagree with a small portion of the reasoning and still agree with the result. *See* IND. APP. R. 11(B)(3). The court used App. R. 11(B)(3) 21 times in 1993 to either adopt in whole or in part the opinion by the court of appeals.

^q This does not include 57 attorney discipline opinions/orders, four writs of mandamus or prohibition, one court reporter disciplinary action and three opinions on certified questions that are matters under the original jurisdiction of the court.

TABLE F
SUBJECT AREAS OF SELECTED DISPOSITIONS
WITH FULL OPINIONS^r

	Number
Original Actions	
• Writs of Mandamus or Prohibition	4 ^s
• Attorney Discipline	57 ^t
• Judicial Discipline	1 ^u
Criminal	
• Death Penalty	6 ^v
• Fourth Amendment or Search and Seizure	5 ^w
• Reserved Questions of Law	0
Emergency Appeals to the Supreme Court	0
Trusts, Estates, or Probate	6 ^x
Real Estate or Real Property	0
Landlord-Tenant	0
Divorce or Child Support	6 ^y
Children In Need of Services (CHINS)	3 ^z
Paternity	1 ^{aa}
Product Liability or Strict Liability	2 ^{bb}
Negligence or Personal Injury	5 ^{cc}
Indiana Tort Claims Act	4 ^{dd}
Statute of Limitations or Statute of Repose	5 ^{ee}
Tax, Department of State Revenue, or State Board of Tax Commissioners	1 ^{ff}
Contracts	11 ^{gg}
Corporate Law or the Indiana Business Corporation Law or Franchise Law	4 ^{hh}
Uniform Commercial Code	2 ⁱⁱ
Banking Law	0
Employment Law	0
First Amendment, Open Door Law, or Public Records Law	2 ^{jj}
Indiana Constitution	10 ^{kk}

^r This Table is designed to provide a general idea of the specific subject areas upon which the court ruled or discussed and how many times it did so in 1993. It is also a quick-reference guide to court rulings for practitioners in specific areas of the law. The numbers corresponding to the areas of law reflect the number of cases in which the court substantively discussed legal issues about these subject areas. A citation list is provided in a footnote for each area.

^s State ex rel. Gordon v. Vanderburgh Circuit Court, 616 N.E.2d 8 (Ind. 1993); Indiana ex rel. Firestone v. Parke Circuit Court, 621 N.E.2d 1113 (Ind. 1993); State In rel Masariu v. Marion Superior Court No. 1, 621 N.E.2d 1097 (Ind. 1993); State exrel. Whitehead v. Madison County Circuit Court, 1993 Ind. Lexis 208

^t In re Bales, 608 N.E.2d 987 (Ind. 1993); In re Buker, 608 N.E.2d 701 (Ind. 1993); In re Vickery, 605 N.E.2d 184 (Ind. 1993); In re McCausland, 605 N.E.2d 185 (Ind. 1993); In re Kinney, 605 N.E.2d 172 (Ind. 1993); In re Shaul, 610 N.E.2d 253 (Ind. 1993); In re Marek, 609 N.E.2d 419 (Ind. 1993); In re Dahlberg, 611 N.E.2d 641 (Ind. 1993); In re Kristoff, 611 N.E.2d 116 (Ind. 1993); In re Schmitt, 611 N.E.2d 116 (Ind. 1993); In re Roberts, 613 N.E.2d 416 (Ind. 1993); In re Noble, 613 N.E.2d 415 (Ind. 1993); In re Kingma-Piper, 613 N.E.2d 843 (Ind. 1993); In re Bodine, 613 N.E.2d 415 (Ind. 1993); In re Christakis, 613 N.E.2d 414 (Ind. 1993); In re Sexson, 613 N.E.2d 841 (Ind. 1993); In re Schenk, 612 N.E.2d 1059 (Ind. 1993); In re Buker, 615 N.E.2d 436 (Ind. 1993); In re Dunnuck, 615 N.E.2d 431 (Ind. 1993); In re Blackwelder, 615 N.E. 2d 106 (Ind. 1993); In re LaCava, 615 N.E.2d 93 (Ind. 1993); In re Geisler, 614 N.E.2d 939 (Ind. 1993); In re Peoples, 614 N.E.2d 555 (Ind. 1993); In re Trueblood, 616 N.E.2d 8 (Ind. 1993); In re Sabato, 617 N.E.2d 548 (Ind. 1993); In re Garver, 619 N.E.2d 928 (Ind. 1993); In re Transki, 620 N.E.2d 16 (Ind. 1993); In re Withers, 619 N.E.2d 923 (Ind. 1993); In re Gallo, 619 N.E.2d 921 (Ind. 1993); In re Long, 619 N.E.2d 919 (Ind. 1993); In re McBride, 619 N.E.2d 911 (Ind. 1993); In re Clanin, 619 N.E.2d 269 (Ind. 1993); In re Ohlsen, 621 N.E.2d 1116 (Ind. 1993); In re Holmes, 621 N.E.2d 634 (Ind. 1993); In re Hamilton, 621 N.E.2d 633 (Ind. 1993); In re Astbury, 621 N.E.2d 632 (Ind. 1993); In re McLaughlin, 621 N.E.2d 634 (Ind. 1993); In re Noel, 622 N.E.2d 154 (Ind. 1993); In re Moore, 621 N.E.2d 1100 (Ind. 1993); In re Larkin, 621 N.E.2d 1099 (Ind. 1993); In re Bruney, 621 N.E.2d 1093 (Ind. 1993); In re Nicolini, 621 N.E.2d 1094 (Ind. 1993); In re Dearmond, 620 N.E.2d 698 (Ind. 1993); In re Peoples, 621 N.E.2d 1092 (Ind. 1993); In re Roemer, 620 N.E.2d 694 (Ind. 1993); In re Becker, 620 N.E.2d 691 (Ind. 1993); In re Roemer, 622 N.E.2d 524 (Ind. 1993); In re Higginson, 622 N.E.2d 513 (Ind. 1993); In re Heamon, 622 N.E.2d 484 (Ind. 1993); In re Shumate, 1993 Ind. Lexis 212; In re Roberts, 1993 Ind. Lexis 214; In re McGrath, 1993 Ind. Lexis 206; In re Massa, 624 N.E.2d 939 (Ind. 1993); In re Burton, 1993 Ind. Lexis 210; In re Peoples, 1993 Ind. Lexis 203; In re Oates, 624 N.E.2d 369 (Ind. 1993); In re Thompson, 624 N.E.2d 466 (Ind. 1993)

^u In re Buker, 608 N.E.2d 701 (Ind. 1993)

^v There were six death penalty cases, and three were affirmed while three were reversed; Averhart v. State, 614 N.E.2d 924 (Ind. 1993); Fleenor v. State, 622 N.E.2d 140 (Ind. 1993); James v. State, 613 N.E.2d 15 (Ind. 1993); Kennedy v. State, 620 N.E.2d 17 (Ind. 1993); Lockhart v. State, 609 N.E.2d 1093 (Ind. 1993); Miller v. State, 623 N.E.2d 403 (Ind. 1993).

^w Fair v. State, 1993 Ind. Lexis 216; Hawkins v. State, 626 N.E.2d 436 (Ind. 1993); Vance v. State, 620 N.E.2d 687 (Ind. 1993); Shane v. State, 615 N.E.2d 425 (Ind. 1993); Bradley v. State, 609 N.E.2d

420 (Ind. 1993)

^x *Estate of Banko v. The Nat'l City Bank of Evansville*, 622 N.E.2d 476 (Ind. 1993); *In re Adoption of T.B. v. T.B.*, 622 N.E.2d 921 (Ind. 1993); *Dodd v. Estate of James Yanan*, 1993 Ind. Lexis 195; *Estate of Chiesi v. First Citizens Bank, NA*, 613 N.E.2d 14 (Ind. 1993); *Frank Shounek in his capacity as Successor Administrator of the Estate of Lillian Jonas v. Suzanne Stirlin*, 621 N.E.2d 1107; *Alwilda Walter v. Mark Balogh*, 619 N.E.2d 566 (Ind. 1993)

^y *Bartrom v. Adjustment Bureau, Inc.*, 618 N.E.2d 1 (Ind. 1993); *Leisure v. Leisure*, 605 N.E.2d 755 (Ind. 1993); *Dodd v. Estate of James Yanan*, 625 N.E.2d 456 (Ind. 1993); *Womack v. Womack*, 622 N.E.2d 481 (Ind. 1993); *In re the Marriage of Richardson and Morgan*, 622 N.E.2d 178 (Ind. 1993); *In re the Marriage of Pettit*, 626 N.E.2d 444 (Ind. 1993)

^z *In re the Adoption of T.B. v. T.B.*, 622 N.E.2d 921 (Ind. 1993); *In re E.M. & L.M. v. Marion County Dept. of Pub. Welfare*, 624 N.E.2d 471 (Ind. 1993); *Shaw v. Shelby County Dept. of Pub. Welfare*, 612 N.E.2d 557 (Ind. 1993)

^{aa} *Shaw v. State*, 612 N.E.2d 557 (Ind. 1993)

^{bb} *Reed v. Central Soya*, 621 N.E.2d 1069 (Ind. 1993); *Martin Rispens & Son v. Hall Farms, Inc.*, 621 N.E.2d 1078 (Ind. 1993)

^{cc} *Martin Rispens & Son, et al. v. Hall Farms, Inc.*, 621 N.E.2d 1078 (Ind. 1993); *LaPalme v. Romero*, 621 N.E.2d 1102 (Ind. 1993); *Templin v. Fobes*, 617 N.E.2d 541 (Ind. 1993); *Jordan v. Deery*, 609 N.E.2d 1104 (Ind. 1993); *Ross v. Lowe*, 619 N.E.2d 911 (Ind. 1993)

^{dd} *Hinshaw v. Board of Comm'rs of Jay County*, 611 N.E.2d 637 (Ind. 1993); *Greathouse v. Armstrong*, 616 N.E.2d 364 (Ind. 1993); *South Bend Community Sch. Corp. v. Widawski*, 622 N.E.2d 160 (Ind. 1993); *Quakenbush v. Lackey*, 622 N.E.2d 1284 (Ind. 1993)

^{ee} *Boostrom v. Bach*, 622 N.E.2d 175 (Ind. 1993); *Schultz-Lewis Child & Family Serv., Inc. v. Jane Doe*, 614 N.E.2d 559 (Ind. 1993); *South Bend Community Sch. Corp. v. Widawski*, 622 N.E.2d 160 (Ind. 1993)

^{ff} *Indiana Dept. of Revenue v. Hardware Wholesalers, Inc.*, 622 N.E.2d 930 (Ind. 1993)

^{gg} *Miller Brewing v. Best Beers*, 608 N.E.2d 975 (Ind. 1993); *FGS Enterprises v. Shimala*, 625 N.E.2d 1226 (Ind. 1993); *Erie Ins. Co. v. Hichman*, 622 N.E.2d 515 (Ind. 1993); *Martin Rispens &*

Son v. Hall Farms, Inc., 621 N.E.2d 1078 (Ind. 1993); Reed v. Central Soya, 621 N.E.2d 1069 (Ind. 1993); Walter v. Balogh, 619 N.E.2d 566 (Ind. 1993); Bartrom v. Adjustment Bureau, Inc., 618 N.E.2d 1 (Ind. 1993); Rosi v. Business Furniture Corp., 615 N.E.2d 431 (Ind. 1993); Insul-Mark Midwest, Inc. v. Modern Materials, Inc., 612 N.E.2d 550 (Ind. 1993); Kelly v. J.B. Smith, 611 N.E.2d 118 (Ind. 1993); City of Gary v. Allstate Ins., 612 N.E.2d 115 (Ind. 1993)

hh Knauf Fibre Glass v. Stein, Trustee of Ashcraft Trucking, Inc., 622 N.E.2d 163 (Ind. 1993); FGS Enterprises v. Shimala, 625 N.E.2d 1226 (Ind. 1993); Enservco, Inc. v. Indiana Sec. Div., 623 N.E.2d 416 (Ind. 1993); Amoco Prod. Co. v. Laird, 622 N.E.2d 912 (Ind. 1993)

ii Martin Rispons & Son v. Hall Farms, Inc., 621 N.E.2d 1078 (Ind. 1993); Insul-Mark Midwest, Inc. v. Modern Materials, Inc., 612 N.E.2d 550 (Ind. 1993)

jj State Bd. of Health v. Journal-Gazette Co., 619 N.E.2d 273 (Ind. 1993); Price v. State, 622 N.E.2d 954 (Ind. 1993)

kk Holmes v. Randolph, 610 N.E.2d 839 (Ind. 1993); Price v. State, 622 N.E.2d 954 (Ind. 1993); State v. Owings, 622 N.E.2d 948 (Ind. 1993); Fair v. State, 1993 Ind. Lexis 216; In re Gary McPheeters, 1993 Ind. Lexis 207; In re Zumrun, 1993 Ind. Lexis 211; FGS Enterprises v. Shimala, 625 N.E.2d 1226 (Ind. 1993); Canbell v. State, 622 N.E.2d 495 (Ind. 1993); Fleenor v. State, 622 N.E.2d 140 (Ind. 1993)

AN ANALYSIS OF THE ARBITRATION RULE OF THE INDIANA RULES OF ALTERNATIVE DISPUTE RESOLUTION

JOHN R. VAN WINKLE*

INTRODUCTION

On November 7, 1991, the Indiana Supreme Court entered an Order effective January 1, 1992, approving and instituting rules of alternative dispute resolution ("ADR") in Indiana. The rules, although recognizing various ADR methods, govern five different ADR procedures: mediation, arbitration, mini hearings, summary jury trials and private judges. This Article will discuss and analyze Rule 3 of the Rules for Alternative Dispute Resolution, providing for arbitration ("ADR Arbitration Rules").

Rule 1.3(B) of the Rules for Alternative Dispute Resolution defines arbitration as a "process in which a neutral third person or a panel, called an arbitrator or an arbitration panel, considers the facts and arguments which are presented by the parties and renders a decision."¹ Arbitration cannot be ordered by a court and will only occur under the rules as a result of an agreement between the parties. That agreement by the parties may also provide that the arbitration decision be binding or non-binding.² Once an agreement to arbitrate is reached, the court enters an order and names a panel of three arbitrators from which the parties can, absent an agreement, strike.³ A hearing is scheduled by the arbitrator or the chair of the arbitration panel.⁴ Although traditional rules of evidence need not apply to the presentation of testimony,⁵ the rules of discovery are applicable to the arbitration process and the regular judge of the court retains jurisdiction to rule on discovery matters and other disputes.⁶ If the parties agreed that the arbitration was to be binding, the decision of the arbitrator or the arbitrators is entered as a judgment.⁷ If the arbitration is not binding, and one of the parties disagree with the arbitrator's decision, the parties may proceed to trial.

* John R. Van Winkle, J.D, 1970, Indiana University School of Law, is a lawyer-mediator and Adjunct Professor at Indiana University School of Law—Indianapolis.

1. Rule 1.3(B), *Rules for Alternative Dispute Resolution*, in INDIANA RULES OF THE COURT 169 (West 1993) [hereinafter IND. A.D.R. RULE].

2. *Id.*

3. IND. A.D.R. RULE 3.3.

4. IND. A.D.R. RULE 3.4(A).

5. IND. A.D.R. RULE 3.4(D).

6. IND. A.D.R. RULE 3.4(C).

7. IND. A.D.R. RULE 3.4(E).

I. HISTORICAL BACKGROUND OF THE ADR ARBITRATION RULE

Rule 3 must be read in conjunction with the common law and statutory provisions relating to arbitration which existed prior to the enactment of the ADR Rules. The ADR Arbitration Rules do not repeal or replace either the common law applicable to arbitration, nor the two previously enacted arbitration statutes, Indiana Code section 34-4-1-1 *et seq.*, ("Indiana Arbitration Act") and Indiana Code section 34-4-2-1 *et seq.*, ("Indiana Uniform Arbitration Act").

A. Common Law of Arbitration

Common law arbitration and statutory arbitration have coincided in Indiana since its statehood.⁸ At common law, any person competent to enter into a contract could agree to submit a dispute or controversy, or even a difference of opinion, to arbitration.⁹ Common law arbitration, however, had two significant limitations. First, although both existing and future disputes could be submitted to arbitration, the arbitrator's decision was only binding or conclusive as to existing disputes and not future ones.¹⁰ Secondly, under common law arbitration, if no lawsuit was pending, the arbitrator's decision did not become a judgment enforceable in court. Rather, the defaulting party was liable on the bond which each party to the arbitration was required to provide.¹¹ Some of the early arbitration statutes were enacted to address these deficiencies in common law arbitration.

Just as the common law concerning arbitration preceded statehood, so did statutory provisions concerning arbitration. The relationship between territorial and state statutes and the common law of arbitration was discussed in two early Indiana cases. The first case, *Mills v. Conner*,¹² having been "argued and determined in the Supreme Court of Judicature of the State of Indiana at Corydon, May Term, 1818, in the second year of the State,"¹³ set forth in a footnote the following: "The statute 9 and 10 Will. 3, authorizes the making submissions, where no cause is pending, rules of Court, by agreement of the

8. Common law arbitration refers to the cumulative decisions of the Courts of England and the Acts of the English Parliament in aid of that common law, in existence prior to the fourth year of James I, which common law decisions and parliamentary enactments are of a general and not specific or local nature and which are not inconsistent with the Constitution of the United States, the Constitution of the State of Indiana or Acts of the United States Congress or the Indiana Legislature. *Shroyer v. Bash*, 57 Ind. 349, 353 (1877).

9. *Milhollin v. Milhollin*, 125 N.E. 217, 218 (Ind. Ct. App. 1919).

10. *Supreme Council of Order of Chosen Friends v. Forsinger*, 25 N.E. 129, 130 (Ind. 1890).

11. *Titus v. Scantling & Wife*, 4 Blackf. 89, 92 (1835).

12. *Mills v. Conner*, 1 Blackf. 7 (1818).

13. *Id.*

parties. This act puts these submissions on the same footing with those where a cause is pending.”¹⁴

The second case, *Titus v. Scantling & Wife* also discussed the history of arbitration and the relationship between common law and statutory arbitration:

In the earliest periods of the history of that law, we find that any persons, though no suit was pending between them, might agree to submit their matters of difference to arbitrators; and that their agreement for this purpose might be without any writing, or by a writing without seal, or it might be by mutual bonds. If the agreement was by bond, and either party refused to comply with the award, his opponent might sue him on the award or on the bond. (Citation omitted.) We find in the old English books of Reports, previously to any statute on the subject, frequent suits on arbitration-bonds. Those bonds contained no agreement, that the submission should be made a rule of Court. The insertion of such an agreement in the bond, originated with the English statute of 9th and 10th of Will. 3d. The object of that statute was to give to persons, submitting their disputes to arbitration where no suit was pending, the same remedy that the common law gives in cases referred after commencement of a suit. (Citation omitted).¹⁵

B. *The Indiana Arbitration Act*

The Indiana Arbitration Act, now codified at Indiana Code section 34-4-1-1, was enacted in 1852 and has been changed little since that time. The first section of the original Act provided as follows:

All persons, except infants, married women and insane persons, may, by an instrument in writing, submit to the arbitration or umpirage of any person or persons, to be by them mutually chosen, any controversy existing between them, which might be the subject of a suit at law, except as otherwise provided in the next section, and may agree that such submission be made a rule of any court of record designated in such instrument.¹⁶

The comments to that Act referred to *Mills* and *Titus* and stated:

When a cause is pending it may be referred to arbitration by consent of parties, and such submission made a rule of court. At common law, however, if no suit were pending, and any matter in controversy were submitted to arbitration, such submission could not be made a rule of court; but the party was left to his action on the award or arbitration

14. *Id.* at 8 n.1.

15. *Titus*, 4 Blackf. at 91-92.

16. 2 Revised Statutes 1852, Ch. 3, § 1, p. 227.

bond. The object of the statute is to give the parties the same remedies that the common law gives in cases referred after the commencement of a suit.¹⁷

Although the statute extended common law arbitration by providing that arbitration of disputes not yet in litigation could nevertheless be enforced after award as a judgment (or "rule of any court"), the statute perpetuated the previous deficiency in the common law in that it provided that only existing, and not future, disputes could be submitted to arbitration. As indicated above, section 1 is clear that parties were free to submit to arbitration "any controversy *existing* between them."¹⁸ (emphasis added). As will be discussed below, the Indiana General Assembly adopted the Indiana Uniform Arbitration Act in part to address this deficiency.

The 1852 Indiana Arbitration Act has been amended infrequently, and then not significantly. For example, a 1939 amendment deleted married women from the first sentence of Section 1. The 1852 statute contained 26 sections, most of those remaining unchanged to this date. Section 2 excepts certain real estate matters from the category of cases which can be arbitrated.¹⁹

Section 3 of the 1852 Act, (now codified at Title 34, section 4-1-3 of the Indiana Code) required the parties, at the time of the agreement to arbitrate, to execute mutual bonds to secure performance of the arbitration award.²⁰ Section 3 also provided that the parties must agree to make the agreement or submission a rule of court, thereby enabling the parties to execute either on the judgment created by the award or to institute an action on the bond.²¹ Under the current statute, as in the 1852 Act, either party can appoint or designate a time and place for the arbitrator or arbitrators to meet.²² Witnesses can be required to attend by issuance subpoenas and, unless the parties agree otherwise, the award of a majority of arbitrators is valid.²³

The Indiana Arbitration Act provided that if either party failed to comply with an award, it could be filed in the court named in the submission.²⁴ The award had to be entered of record and a rule granted to show cause before judgment could be entered.²⁵

Upon a rule to show cause, an adverse party was provided with three grounds to object to the rendition of a judgment: that the award was obtained by fraud, that the arbitrators were guilty of misconduct or that the arbitrators

17. 2 Revised Statutes 1852, Ch. 3, § 1, p. 227, cmt.

18. 2 Revised Statutes 1852, Ch. 3, § 1, p. 227.

19. IND. CODE § 34-4-1-2 (1993).

20. IND. CODE § 34-4-1-3 (1993).

21. Hawes v. Coombs, 34 Ind. 455, 458 (1870).

22. IND. CODE § 34-4-1-4 (1993).

23. IND. CODE § 34-4-1-8 (1993).

24. Currently codified at IND. CODE § 34-4-1-12 (1993).

25. Currently codified at IND. CODE § 34-4-1-13 (1993).

exceeded their power.²⁶ The 1852 Indiana Arbitration Act also provided, and current law provides today, that any party to a submission can move the court to modify or correct an award on three bases: an evident miscalculation of figures,²⁷ a decision on a matter or matters not submitted to arbitration, and a clearly defective award.

In summary, the 1852 statute (the Indiana Arbitration Act) empowered parties to enter into *irrevocable* contracts to submit *existing* disputes to *binding* arbitration, the awards from which could be entered and enforced as *judgments*. The obvious, and commercially important, deficiency in the Indiana Arbitration Act was that it did *not* allow parties to enter into written agreements to submit *future* disputes to arbitration. This deficiency was addressed by the adoption of the Indiana Uniform Arbitration Act.

II. UNIFORM ARBITRATION ACT

The first draft of a uniform arbitration statute was considered by the National Conference of Commissioners on Uniform State Laws in August of 1954.²⁸ The final draft, called the "Uniform Arbitration Act," was approved by the American Bar Association in 1955.²⁹

Fifteen years elapsed before Indiana adopted the Act.³⁰ Prior to that time, Indiana's businessmen and women were without a significant commercial weapon. Although both at common law and under the Indiana Arbitration Act, parties could agree to submit existing disputes to arbitration, commercial contract provisions requiring *future disputes* between the parties to a transaction or a contract to be submitted to arbitration were not enforceable.

For reasons that are not clear, when the Indiana General Assembly adopted the Indiana Uniform Arbitration Act, the first section of the Uniform Act was changed significantly. The Uniform Act, as approved by the National Conference of Commissioners on Uniform State Laws, provided as follows:

A written agreement to submit any existing controversy to arbitration or a provision in a written contract to submit to arbitration any controversy thereafter arising between the parties is valid, enforceable and irrevocable, save upon such grounds as exists at law or in equity for the revocation of any contract. This Act also applies to arbitration agreements between employers and employees or between their respective representatives [unless otherwise provided in the agreement].³¹

Indiana changed that section however, as follows:

26. Currently codified at IND. CODE § 34-4-1-16 (1993).

27. Currently codified at IND. CODE § 34-4-1-17 (1993).

28. Pirsig, *Toward a Uniform Arbitration Act*, 9 ARB. J. 115.

29. UNIF. ARB. ACT, 7 U.L.A. 1 (1985).

30. Codified at IND. CODE § 34-4-2-1 (1993).

31. UNIF. ARB. ACT § 1, 7 U.L.A. 5 (1985).

A written agreement to submit to arbitration is valid, and enforceable, an existing controversy or a controversy thereafter arising is valid and enforceable, save upon such grounds as exist at law or in equity for the revocation of any contract. If the parties to such an agreement so stipulate in writing, the agreement may be enforced by designated third persons, who shall in such instances have the same rights as a party under this chapter. This chapter also applies to arbitration agreement between employers and employees or between their respective representatives (unless otherwise provided in the agreement).³²

No explanation is found for the changing of this language, which, it is submitted, renders nonsensical the first section of the Indiana Uniform Arbitration Act. It must be assumed that the meaning and intent is the same as that of the general Uniform Arbitration Act.

Under the Indiana Uniform Arbitration Act, arbitration is "initiated by a written notice by either party, mailed by registered or certified mail, or delivered to the other party, briefly stating a claim, the grounds for the claim, and the amount or amounts. Issues are joined by a written notice of admissions or denials and counterclaims or set-offs shall also be mailed and delivered."³³ Upon the application of a party demonstrating an opposing party's refusal to arbitrate, the court has the authority under the Indiana Uniform Arbitration Act to order the parties to proceed with arbitration.³⁴ If the opposing party denies the existing agreement to arbitrate, a summary determination of this issue is made by the court without further pleading.³⁵ Parties may apply to the court for a stay of arbitration, demonstrating that no agreement to arbitrate exists. This issue is also to be summarily determined without further pleadings.³⁶

As is true with many aspects of the Indiana Uniform Arbitration Act, the parties are given the opportunity to determine in the arbitration agreement many of the terms and conditions which will guide and bind the parties in the arbitration. Parties have, for example, the right to determine the manner in which the arbitrators are appointed.³⁷ One important provision of the Indiana Uniform Arbitration Act, however, provides that the court has the authority to stay an arbitration proceeding upon a showing that the method of appointment of arbitrators is likely to, or has, resulted in the appointment of arbitrators who are partial or biased.³⁸ If the arbitration agreement does not provide a method

32. IND. CODE § 34-4-2-1(a) (1993).

33. IND. CODE § 34-4-2-2 (1993).

34. IND. CODE § 34-4-2-3(a) (1993).

35. *Id.*

36. IND. CODE § 34-4-2-3(b) (1993).

37. IND. CODE § 34-4-2-4 (1993).

38. IND. CODE § 34-4-2-3(g) (1993).

of appointment of arbitrators, and if the parties cannot agree on any method, the court is given the authority to appoint one or more arbitrators.³⁹

The parties can also provide in the arbitration agreement for the details of the arbitration hearing. If the agreement does not so provide, the arbitrators are required under the Act to appoint a time and place for the hearing.⁴⁰ The Indiana Uniform Arbitration Act makes clear that the arbitrators have the authority to issue subpoenas for the attendance of witnesses and for the production of books, records, documents and other evidence.⁴¹ The arbitrators may also “order depositions to be taken for use as evidence, and not for discovery, if the witness cannot be subpoenaed or is unable to attend the hearing.”⁴²

Upon an award in arbitration, the parties have ninety days after the mailing of the award to apply to the court to vacate the arbitrator’s award.⁴³ The court has the authority to vacate an award when (1) the award was procured by corruption or fraud; (2) the award demonstrates evident partiality; (3) the arbitrators exceeded their powers; (4) the arbitrators refused to postpone the hearing upon sufficient cause shown or refused to hear material evidence; or (5) no arbitration agreement existed.⁴⁴ If the award is not vacated and, after the expiration of ninety days from the date of the mailing of the copy of the award, either party may apply to the court to confirm the arbitrator’s award.⁴⁵ Upon such confirmation, the court shall enter a judgment consistent with the arbitration award and cause the judgment to be docketed as if rendered in an action decided by the court.⁴⁶

In addition to the procedures for vacation of an award, parties may also apply within ninety days after the mailing of a copy of the award for “modifications or corrections” of the award. The court has the authority to modify or correct the award where (1) there was an evident miscalculation of figures; (2) the arbitrators made an award upon a matter not submitted; or (3) the award was imperfect in a matter of form which did not affect the merits of the controversy.⁴⁷

The “court” which is referred to in the Indiana Uniform Arbitration Act is any circuit or superior court in Indiana.⁴⁸ Venue for the application or applications described in the Act shall be made to the court in the county where

39. IND. CODE § 34-4-2-4 (1993).

40. IND. CODE § 34-4-2-6 (1993).

41. IND. CODE § 34-4-2-8(a) (1993).

42. IND. CODE § 34-4-2-8(b) (1993).

43. IND. CODE § 34-4-2-13(b) (1993).

44. IND. CODE § 34-4-2-13(a) (1993).

45. IND. CODE § 34-4-2-12 (1993).

46. IND. CODE § 34-4-2-12 (1993).

47. IND. CODE § 34-4-2-14 (1993).

48. IND. CODE § 34-4-2-17 (1993).

the adverse party resides or has a place of business; or, if he has no residence or place of business in the state, to the court of any county.⁴⁹

The Indiana Uniform Arbitration Act provides for limited appeals. Appeals may be taken from (1) an order denying an application to compel arbitration; (2) an order granting application to stay arbitration; (3) an order confirming or denying confirmation of an award; (4) an order modifying or correcting an award; (5) an order vacating an award without directing a rehearing; or (6) a judgment or decree entered pursuant to the Act.⁵⁰ All appeals shall be taken in the same manner and to the same extent as orders or judgments in any civil action.⁵¹ It is against this statutory and common law arbitration background that the ADR Arbitration Rule must be examined.

III. ADR ARBITRATION RULE

A. Relationship of Arbitration Under the Common Law, the Indiana Arbitration Act, the Indiana Uniform Arbitration Act and the ADR Arbitration Rules

Of the five ADR methods governed by the ADR Rules (mediation, arbitration, mini-trials, summary jury trials and private judging), only mediation and mini-trials can be ordered by a court without the agreement of all parties.⁵² The others, including arbitration, cannot be ordered sua sponte, but must result from an agreement of all parties.⁵³ Indiana, therefore, does not have "mandatory arbitration."⁵⁴

Arbitration under the ADR Arbitration Rules may occur if a lawsuit has already been instituted and if all parties to the lawsuit agree to arbitration. In contrast, under the Indiana Uniform Arbitration Act, if the parties to the dispute had entered into a contract or agreement to submit all future disputes to arbitration before the dispute actually arose then arbitration of the subsequent dispute would occur under the Indiana Uniform Arbitration Act and a general civil suit would not have been filed (unless the parties waived arbitration).⁵⁵

As stated, the primary purpose of the 1852 statute, The Indiana Arbitration Act, was to provide enforcement by judgment for arbitration awards entered in

49. IND. CODE § 34-4-2-18 (1993).

50. IND. CODE § 34-4-2-19 (1993).

51. IND. CODE § 34-4-2-19 (1993).

52. IND. A.D.R. RULE 2.2., 4.2.

53. IND. A.D.R. RULE 3.1.

54. Unless, of course, the parties, prior to the lawsuit, had entered into an agreement to arbitrate, enforceable under the Uniform Arbitration Act.

55. *Slutsky-Peltz Plumbing & Heating Co., Inc. v. Vincennes Community Sch. Corp.*, 556 N.E.2d 344 (Ind. Ct. App. 1990) (parties to a previously made arbitration agreement could presumably waive this contractual obligation, begin litigation under the general civil procedure and then agree to submit the matter to arbitration under the ADR Court Rules).

arbitration conducted where *no lawsuit was pending*.⁵⁶ At common law, if a lawsuit was pending, the parties could agree to submit the dispute to arbitration and the result would be enforceable as a judgment.⁵⁷

Section 22 of the 1852 statute provided (and provides today) as follows:

If the subject-matter of any suit pending in any court might originally have been submitted to arbitration, the parties to such suit, their agent or attorney-at-law, may consent, by rule of court, to refer the matters in controversy to certain persons mutually chosen by them in open court.⁵⁸

While it appears that this section would allow parties to agree *after* a law suit is filed to submit the matter to arbitration, it is probably limited to submission of the case to *referees* and not to arbitration. The 1852 Act has “referees” as a headnote for section 22 and such an interpretation is consistent with *Francis v. Ames*,⁵⁹ in which the court held that the Code of 1852 made no provision for the submission of pending lawsuits to arbitration. Rather, an agreement attempted under the 1852 code will be treated as and controlled by common law arbitration principles.⁶⁰ Such an agreement under this statute could not be revoked by the parties without the approval of the trial judge.⁶¹

Even though the right to submit issues in pending litigation existed at common law, the ADR Arbitration Rules do provide one significant difference. If the parties in litigation, at common law, agreed to subject issues to arbitration, *either* party could *revoke* the agreement to arbitrate at any time before the arbitration award is actually rendered.⁶² Clearly, under Rule 3.1 of the ADR Arbitration Rules, the agreement to arbitrate could only be revoked by consent of both parties and, probably, only with the approval of the court.⁶³

In summary, several observations can be made about the relationship between common law arbitration, the Indiana Arbitration Act, the Indiana Uniform Arbitration Act, and the ADR Arbitration Rules. First, if the parties to a dispute had a pre-existing contractual obligation to submit disputes arising in the future to arbitration, the arbitration would proceed pursuant to the Indiana Uniform Arbitration Act. Common law and the Indiana Arbitration Act did not provide for the enforcement of agreements to arbitrate future disputes. Secondly, if the parties to a dispute did not have a pre-existing agreement to arbitrate, and no lawsuit was on file, the parties could agree to submit their dispute to

56. *Titus v. Scantling & Wife*, 92 Blackf. 89, 92 (1835).

57. *Id.*

58. Currently codified at IND. CODE § 34-4-1-22 (1993).

59. 14 Ind. 251, 252 (1860); *see also* *Daggy v. Cronnelly*, 20 Ind. 474 (1863).

60. *Francis v. Ames*, 14 Ind. at 253.

61. *Heritage v. State ex rel. Crim*, 88 N.E. 114, 116 (Ind. Ct. App. 1909).

62. *Shroyer v. Bash*, 57 Ind. 349, 353 (1877); *Grand Rapids & I. Ry. Co. v. Jaqua*, 115 N.E. 73, 76 (Ind. Ct. App. 1917); *Dilks v. Hammond*, 86 Ind. 563, 566 (1882).

63. IND. A.D.R. RULE 3.1.

arbitration under common-law or under the Indiana Arbitration Act. At common law, however, the agreement could be revoked by either party prior to an award and, upon a default, the only remedy was on the arbitration bond. The parties could proceed under the Indiana Arbitration Act and, although a bond would still be required, regular judgment enforcement remedies would be available. The ADR Arbitration Rules have no application (as of this date) to disputes where no litigation is pending. Thirdly, if the parties did not have pre-existing contracts to arbitrate and a lawsuit is already pending, the parties could proceed to arbitration *either* under the common law or under the ADR Arbitration Rules. In such instances, however, the discussion of common law arbitration is primarily of academic interest as parties can be expected to generally proceed under the ADR Arbitration Rules.

B. Initiation of Arbitration Under the ADR Arbitration Rules

Under Rule 3.1 of the ADR Arbitration Rules, arbitration is initiated by the *filing* of an agreement to arbitrate ("Arbitration Agreement").⁶⁴ Clearly, the agreement requires the consent of all parties but it is not as clear whether the trial court can refuse to accept an Arbitration Agreement. Rule 3.1 provides that upon *approval*, the Arbitration Agreement "shall be noted on the Chronological Case Summary of the Case and placed in the Records of Judgments and Orders for the court."⁶⁵ Presumably the "approval" required is that of the trial court. The scope of the trial court's discretion in granting approval or non-approval for Arbitration Agreements is not specified but it is submitted that such discretion should be limited; perhaps limited to the grounds provided in ADR Court Rule 1.4.G.⁶⁶ That provision controls the application of the ADR Rules and states that the rules (including the arbitration rule) do not apply to "matters in which there is very great public interest, and which must receive an immediate decision in the trial and appellate courts."⁶⁷

One interpretation of the ADR Rules, therefore, is that if the parties agree to submit issues to arbitration, that agreement should be binding on the trial court unless the case involves issues of public interest requiring immediate decision. Another possible interpretation of Rule 3.1 is that the trial court has the discretion to approve or disapprove certain aspects of the Arbitration Agreement. Rule 3.1 provides that the parties can, by their Arbitration Agreement, designate the procedural rules to be followed during the arbitration. The trial court may

64. IND. A.D.R. RULE 3.1.

65. *Id.*

66. IND. A.D.R. RULE 1.4(G).

67. IND. A.D.R. RULE 1.4(G). This provision was added by the Indiana Supreme Court as it was not in the draft of the "Proposed Rules for Accelerated Dispute Resolution" promulgated by the Supreme Court Committee on Rules of Practice and Procedure, submitted for public hearing on July 15, 1991.

be empowered under Rule 3.1 to approve the agreement to arbitrate but reject certain aspects of the agreed procedural provisions.

Another uncertainty inherent in ADR Arbitration Rule 3.1 is whether two or more parties, in multi-party lawsuits, can agree to arbitrate issues unique to them, without the agreement of the remaining parties. It is submitted that because arbitration can be limited to certain issues, parties to a cross-claim should be free to submit that cross-claim to arbitration even over the objection of other parties.

C. Arbitration Agreement

The ADR Arbitration Rules require that the parties enter into a *written* Arbitration Agreement and that the agreement be *filed* with the trial court.⁶⁸ Because Rule 3.1 does not require signatures of the parties, the parties' attorneys can presumably sign the Arbitration Agreement.⁶⁹

The ADR Arbitration Rules are extraordinary in that they allow the parties to make the most fundamental decisions concerning the arbitration process. The parties can decide:

1. whether the arbitration process is *binding or non binding*;
2. whether *all or part* of the issues in the case will be arbitrated;
3. whether *one or more* arbitrators shall decide the case;
4. what *procedural rules* are to be followed during the mediation process.⁷⁰

Of these, the right to determine if the arbitration is binding or not binding is probably the most significant. As was indicated above, the original thrust of the ADR rules proposed by the initial committee was for "non-binding" arbitration; non-binding in the sense that either party could reject the arbitration amount or result and proceed to a trial de novo. An early proposal of the committee working on the ADR rules states: "The Committee believes that a form of non-binding arbitration, albeit with appeal disincentives, would be an effective alternative to litigation in many instances in Indiana."⁷¹

Although this "Michigan Model" was not adopted and a mediation-focused rule emerged, Rule 3 reserves to the parties the opportunity to proceed in the manner originally contemplated by the initial committee. "Appeal disincentives" of attorney's fees and costs as sanctions for parties rejecting non-binding arbitration awards and failing to do better at trial were not retained. However,

68. IND. A.D.R. RULE 3.1.

69. IND. A.D.R. RULE 3.1. Preferred practice would, however, be to have the parties themselves sign the Arbitration Agreement. Such signatures would preclude questions concerning authority should problems arise or subsequent counsel became involved.

70. IND. A.D.R. RULE 3.1 (emphasis added). As will be discussed below, this right is limited by specific requirements.

71. Proposal of the Young Lawyer's Section of the Indiana State Bar Association for an Alternative Form of Dispute Resolution in Indiana (on file with the author) (1988).

studies and reviews of the experience of other states with similar statutes demonstrate that a high percentage of parties accept the non-binding evaluation or arbitration "award" and do *not* seek a trial de novo.⁷² In one study, for example, during the ten years of a court-annexed arbitration program in the Eastern District of Pennsylvania, only 388 of 17,006 cases required a trial de novo.⁷³

In mediation, the neutral third party, the mediator, will generally be reluctant to state specifically his or her opinion as to the outcome of a case. Parties, therefore, who perceive a value in a mediator's opinion, but would like to have the safety net of the trial de novo, will find non-binding arbitration to be of value.

The right to determine whether all or part of the issues in a case should be arbitrated and the right to select the number of arbitrators are also significant for the parties.

Although Rule 3.1 provides that the parties may include in the Arbitration Agreement the procedural rules to be followed, the scope and extent of that right is limited by the specific procedural requirements of the remaining sections of Rule 3. Rule 3.4, for example, provides that upon accepting the appointment to serve, the arbitrator or chair of the panel "shall meet with all attorneys of record to set a time and place for any arbitration hearing."⁷⁴ Other provisions of the rule are subject to an "unless otherwise agreed by the parties" condition; one relating to the amount of the fee⁷⁵ and the other relating to whether papers must be filed and exchanged.⁷⁶

The extent to which the parties can define its procedural aspects of the arbitration process will be discussed in the context of the remaining sections of the ADR Arbitration Rules.

D. Case Status During Arbitration

Rule 3.2 provides that cases submitted to arbitration "shall remain on the regular docket and trial calendar of the court."⁷⁷ If the parties have agreed to binding arbitration on all issues, then the case shall be removed from the trial calendar but remain on the regular docket. The last sentence of Rule 3.2, which provides that the court remains available during arbitration "to rule and assist in any discovery or pre-arbitration matters or motions,"⁷⁸ would seem to contradict a full reading or full meaning of remaining on the "regular docket." Rule 1.7

72. Raymond J. Broderick, *Court-Annexed Compulsory Arbitration: It Works*, 72 JUDICATURE 217 (1989).

73. *Id.* at 220.

74. IND. A.D.R. RULE 3.4.

75. IND. A.D.R. RULE 3.3.

76. IND. A.D.R. RULE 3.4.

77. IND. A.D.R. RULE 3.2.

78. *Id.*

provides that “during the course of any alternative dispute resolution proceeding, the case remains within the jurisdiction of the court” and that, “[f]or good cause shown and upon hearing,” the court can terminate any ADR process.⁷⁹ It is submitted that Rule 3.2 was not intended to be a limitation on Rule 1.7 and, even in binding arbitration, for “good cause” it can be terminated.

What is the significance of a case remaining on the “regular docket” of a court during an arbitration proceeding? One interpretation is that by remaining on the regular docket, cases in arbitration remain subject to other rules and procedures governing all civil cases. Rules concerning time, pleadings, third-party practice, dispositive motions, summary judgments, pre-trial, “lazy judge” rules, and all other such rules could arguably be applicable. The other interpretation, supported by the last sentence of Rule 3.2, is that the court’s only power during arbitration is to remove the case under Rule 1.7, or to rule on discovery or pre-arbitration matters or motions.

E. Assignment of Arbitrators

Rule 3.3 anticipates that arbitrators will be selected from lists of “lawyers engaged in the practice of law in the county who are willing to serve as arbitrators.”⁸⁰ The rule requires that each court maintain a list of such attorneys and that the parties can select one or more arbitrators from the court listing *or the listing of another court in the state*.⁸¹

The reality, however, is that (as of the date of this writing) few courts in Indiana maintain a list of arbitrators. Until such lists are common, the parties should select the person or persons they believe competent to act as arbitrator or arbitrators and seek an order from the court approving that selection. If the parties cannot agree on an arbitrator, they can perhaps agree on a panel and agree to strike alternatively from that panel and submit the name remaining to the court for approval.

The court’s order approving the arbitrator and decreeing that the selection and arbitration is pursuant to Rule 3 is important to ensure that the immunity, confidentiality and other rule provisions will be applicable. If the parties have agreed that the arbitration is to be conducted by a panel, they can agree on the panel members, not to exceed three.⁸² If the parties have agreed to a panel but cannot agree on its members, Rule 3.3 provides that each party shall select one arbitrator and the *court* shall select the third. Until courts have developed lists, this process will be easier if the parties agree on the arbitrators, or at least,

79. IND. A.D.R. RULE 1.7.

80. IND. A.D.R. RULE 3.3.

81. *Id.* (emphasis added).

82. *Id.*

stipulate to a selection and striking process. If a panel of arbitrators is used, the arbitrators are required to select among themselves a chair of the panel.⁸³

One question raised, but not answered, by the ADR court rules, is whether the decision of a panel of arbitrators must be unanimous or majority. At common law, if the agreement of the parties was silent, the award of the arbitrators had to be unanimous.⁸⁴ The Indiana Arbitration Act provides that the award of a majority of the arbitrators is valid, unless otherwise provided in the submission or agreement.⁸⁵ Similarly, the Indiana Uniform Arbitration Act provides that unless otherwise provided by the agreement, the powers of the arbitrators may be exercised by a majority.⁸⁶ Although courts will probably rule that a majority of arbitrators can act, the parties should nevertheless cover this issue in their Arbitration Agreement to avoid problems.

There is no specific provision indicating that those parts of the Indiana Arbitration Act and the Indiana Uniform Arbitration Act not in conflict with the ADR Rules apply to arbitrations under the ADR Arbitration Rules. The ADR Court Rules do, however, encourage the parties "use" the provisions of those rules to the extent possible and appropriate.⁸⁷ Also, in a recent Indiana Supreme Court decision, the court demonstrated a willingness to intertwine provisions of the acts by citing the preamble of the ADR Rules in a case involving an arbitration brought under the Indiana Uniform Arbitration Act.⁸⁸

F. Arbitration Procedures

1. Discovery.—Perhaps the most significant provision of the ADR Arbitration Rules is Rule 3.4(C). That rule specifically provides that the discovery rules of the Rules of Civil Procedure apply to arbitration proceedings.⁸⁹ Rule 3.2 provides that the trial court retains jurisdiction to rule on discovery matters.⁹⁰

By providing that discovery rules are applicable to arbitration, the Indiana Supreme Court has significantly changed the manner in which arbitration will proceed, as well as how it will be perceived. The right to take depositions and to require the production of documents will provide many Indiana trial lawyers with the "security" or the comfort level necessary for an agreement to arbitrate. At the same time, discovery in the arbitration process will move arbitration closer to a more "formal" process. Robert Coulson, the long-time president of

83. *Id.*

84. *Byard v. Harkrider*, 9 N.E. 294 (Ind. 1886); *Baker v. Farmbrough*, 43 Ind. 240 (1873).

85. IND. CODE § 34-4-1-8 (1993).

86. IND. CODE § 34-4-2-5 (1993).

87. IND. A.D.R. RULE 3.4(B).

88. *School City of East Chicago v. East Chicago Fed'n of Teachers*, 622 N.E.2d 166, 168 (Ind. 1993).

89. IND. A.D.R. RULE 3.4(C).

90. IND. A.D.R. RULE 3.2.

the American Arbitration Association, has observed the arbitration process develop over the last several decades. He has seen arbitration evolve from a relatively simple and uncomplicated process involving primarily the participation of the parties, to one of increasing complexity and attorney participation. "Additional procedures are being engrafted upon the relatively informal arbitration process, usually at the suggestion of attorneys. To the extent that arbitration includes such procedures, it becomes more expensive, more like litigation."⁹¹

Although Coulson submits that the American Arbitration Association encourages parties to reduce the cost of arbitration, it also believes that the parties should have the "right to decide whether their arbitration will be informal or will incorporate additional optional procedures."⁹²

2. *Evidence in Arbitration—Submission of Materials.*—ADR Arbitration Rule 3.4(D) provides that traditional rules of evidence "need not apply with regard to the presentation of testimony."⁹³ Rule 3.4(B) provides that the parties to the arbitration, unless they agree otherwise in the Arbitration Agreement, are required to file with the arbitrator or the chair of the arbitration panel (and exchange among all attorneys of record) all documents that the parties desire to be considered in the arbitration process.⁹⁴ The documents or evidence are to be exchanged, unless otherwise agreed, fifteen days prior to any hearing date. Although the ADR Arbitration Rules do not limit the type or nature of documents or evidence which can be submitted at the arbitration proceeding, Rule 3.4(B) lists medical records, bills, records, photographs and other materials supporting the claim of a party as the type of documents that can be introduced.

As indicated, the parties in the Arbitration Agreement can provide whether the arbitration is to be binding or non-binding. There appear to be differences in the manner in which the evidence will be received in non-binding and binding arbitrations. Rule 3.4(b) provides that in the case of *binding* arbitration, parties can object to the admissibility of documents under traditional rules of evidence.⁹⁵ This would seem to indicate that in non-binding arbitration proceedings, the parties have no such right of objection. This is consistent with Rule 3.4(d) which provides that traditional rules of evidence *need not* apply with regard to the presentation of testimony. It is not clear whether the parties are to agree as to whether the traditional rules of evidence apply or whether that matter is left to the discretion of the arbitrator or arbitrators. Better practice would seem to indicate that the parties should cover this topic also in the Arbitration Agreement.

91. Robert Coulson, "Away from Informality" *Arbitration and the Law*, 1992-93 AAA GENERAL COUNSEL ANNUAL REPORT 17.

92. *Id.* at 18.

93. IND. A.D.R. RULE 3.4(D).

94. IND. A.D.R. RULE 3.4(B).

95. *Id.*

There is one significant limitation on the objection to documentary evidence contained in Rule 3.4(B). If the parties intend to object to any document, such objection shall be filed with the arbitrator at least five days prior to the hearing or such objections will be deemed waived.⁹⁶ In non-binding arbitration, because no objections are contemplated, this waiver provision will have no effect.

3. *Presentation of Witnesses at Arbitration Hearing.*—The ADR Arbitration Rules appear to give to the arbitrator or arbitrators the discretion as to whether witnesses may be called by the parties.⁹⁷ The Rules provide, "as permitted by the arbitrator or arbitrators, witnesses may be called."⁹⁸ Arguably, it would be more likely for witnesses to be allowed in binding arbitrations than non-binding. Thirty days prior to arbitration hearing, each party is required to file a list of witnesses that will be called to testify.⁹⁹ In addition to "live" witnesses, the Rules anticipate that the parties can introduce or use depositions and reports. Presumably, the reference to reports would include expert reports. In the list of witnesses (which are to be filed thirty days prior to hearing), the parties are to designate whether individuals will be called in person, by deposition or by written report.¹⁰⁰ Lawyers should remember that they need to object, at least five days prior to the hearing, to any deposition or written report which the other party has indicated is intended to be introduced.¹⁰¹ The failure to object within that period of time may constitute a waiver under the provisions of Rule 3.4(B). Although the provisions concerning the applicability of discovery rules indicates a move to a more formal arbitration proceeding, the provisions of 3.4(B) granting to the arbitrator the discretion as to whether witnesses can be presented live at the hearing, together with the provision allowing oral presentations of the facts supporting a party's position, would seem to be a counter move to a more traditional and more informal arbitration process.

Under Rule 3.4(D), it is clear that the attorneys have the right to summarize orally what they believe to be the factual basis of a party's position. The limitation on this right is the provision that the representatives or attorneys of the respective parties must be able to substantiate whatever statements they make or whatever representations are made "as required by the Rules of Professional Conduct."¹⁰² Although presumably all Rules of Professional Conduct are applicable, Rule 3.3 would seem to be specifically applicable. That Rule provides that an attorney shall not knowingly make a false statement of a

96. *Id.*

97. IND. A.D.R. RULE 3.4(D).

98. *Id.*

99. IND. A.D.R. RULE 3.4(C).

100. *Id.*

101. IND. A.D.R. RULE 3.4(B).

102. IND. A.D.R. RULE 3.4(D).

material fact or law to a tribunal.¹⁰³ Presumably, in the case of the arbitration, the arbitrator would be considered a tribunal. Further, Rule 3.3 prohibits a lawyer from offering evidence that the lawyer knows to be false.¹⁰⁴

4. *Hearing.*—Upon accepting the appointment to serve, the arbitrator or the chair of the arbitration panel is required to meet with all attorneys of record to set a time and place for an arbitration hearing.¹⁰⁵ Because of the use of the word "shall" in Rule 3.4(A), it is not clear that this initial meeting can be waived. It is submitted, however, that a telephonic conference would hopefully be considered to be in compliance with the Rule. Again, the parties should cover this issue in their Arbitration Agreement.

The location of the arbitration hearing is also a subject matter for the parties' Arbitration Agreement. In the absence of such an agreement, the place of the hearing is in the discretion of the arbitrator or chair of the arbitration panel. The Rules do provide that courts are encouraged to allow access to regular courtroom facilities when use is not anticipated.¹⁰⁶ Clearly, arbitrations can be held anywhere that the parties and the arbitrators find reasonable, including law office conference rooms, public meeting rooms and other such facilities.

The Rule specifically provides that arbitration proceedings "shall" not be open to the public.¹⁰⁷ Presumably, part of the reason for a closed hearing is the fact that arbitration proceedings are considered to be settlement negotiations and subject to the same confidential restrictions as mediation proceedings.¹⁰⁸ Any evidence tending to indicate the willingness to accept or offer any valuable consideration to settle a claim is not admissible to prove liability for or in validity of the claim or its amount.¹⁰⁹ Further, evidence of conduct or statements made during the arbitration process is not admissible in any subsequent proceeding.¹¹⁰ Clearly, the confidentiality provisions and the provision requiring arbitration proceedings to be closed to the public are in part necessitated by the fact that the arbitration process may not dispose of all the issues. In cases in which the parties have agreed to non-binding arbitration, subsequent proceedings are clearly a possibility.

103. MODEL RULES OF PROFESSIONAL CONDUCT Rule 3.3.

104. *See also* Comment, MODEL RULES OF PROFESSIONAL CONDUCT Rule 3.3: However, an assertion purporting to be on the lawyer's own knowledge, as in an Affidavit by the lawyer, or in a statement in open court, may properly be made only when the lawyer knows the assertion is true, or believes it to be true on the basis of a reasonably diligent inquiry. There are circumstances where failure to make a disclosure is the equivalent of an affirmative misrepresentation.

105. IND. A.D.R. RULE 3.4(A).

106. *Id.*

107. IND. A.D.R. RULE 3.4(D).

108. *Id.*

109. *Id.*

110. *Id.*

5. *Confidentiality*.—Although Rule 3.4 provides that arbitration proceedings are to be considered settlement negotiations, there are important restrictions on the confidentiality provisions. First, using Federal Rule of Evidence 408 as a reference, it should be noted that that rule only protects offers of compromise regarding the "validity or amount" of a "disputed" claim.¹¹¹ Further, Rule 3.4 is clear that it does not preclude the exclusion of any evidence otherwise discoverable merely because it was mentioned or presented during the course of the arbitration process. This may prove to be a difficult rule to interpret and enforce. For example, in a non-binding arbitration hearing, the parties can be expected to present substantially all of the evidence that they believe to be relevant and necessary to prove their claims or defenses. Clearly, this same evidence would be presented at any subsequent trial, should the parties reject the arbitration determination. It is submitted that Rule 3.4 should be interpreted to prohibit parties from introducing at a subsequent trial or any subsequent legal proceeding, evidence of what any witness or party did or said during the arbitration process. If, for example, a party in an arbitration hearing testified that he or she told a company accountant that the funds were placed in an escrow account in the local bank, the adverse counsel would be unable to ask at a subsequent hearing or trial whether the statement was made. That question would be improper under Rule 3.4(D). However, Rule 3.4 does not preclude the introduction of evidence which is otherwise discoverable. Therefore, adverse counsel in the hypothetical situation would be able to ask the witness or party at a subsequent hearing whether he or she told the accountant that funds were placed in a local bank. If the witness answered in the negative, the impeaching evidence could not be used. However, the adverse party would be entitled to call the accountant independently to testify about the conversation and would also be able to present testimony of bank records or other documentation independently, showing the funds being placed in the bank. The mere fact that a party learns of a fact during an arbitration hearing, does not preclude that party from obtaining other, independent evidence to present at a subsequent hearing. Also, Rule 3.4 specifically provides that it does not require exclusion of evidence which is offered for another purpose, such as proving bias or prejudice of a witness or in negating a contention of undue delay.¹¹²

G. Pre-Arbitration Brief

Five days prior to the arbitration hearing, each party *may* file with the arbitrator or chair a pre-arbitration brief.¹¹³ The brief should set forth the factual and legal positions concerning the issues being arbitrated.¹¹⁴ If filed,

111. FED. R. EVID. 408.

112. IND. A.D.R. RULE 3.4(D).

113. IND. A.D.R. RULE 3.4(B).

114. *Id.*

Rule 3.4(D) provides that the arbitration briefs are to be served upon the opposing party or parties. Further, the parties in the arbitration agreement can alter the filing deadlines for the briefs.¹¹⁵

H. Arbitration Determination

The ADR Arbitration Rules provide that the arbitrator or chair shall file a written determination or award within twenty days after the hearing.¹¹⁶ The filing shall be made in the pending litigation and a copy of the determination or award is to be served on all parties participating in the arbitration.¹¹⁷

Clearly, significant differences occur depending upon whether the arbitration is binding or non-binding. If the parties had agreed that the arbitration was binding as to all issues, the determination or award is to be entered by the court as a judgment.¹¹⁸

If the arbitration was binding on part of the issues, but not all, the court shall file and accept the arbitrator's award or determination as a "joint stipulation by the parties" and proceed with the litigation on the remaining issues.¹¹⁹

If the arbitration was non-binding on any or all issues, each party is required to affirmatively reject (in writing) the arbitration determination or award within twenty days from the filing of the written determination.¹²⁰ If the arbitration award or determination is not rejected within that twenty day period, the award or determination becomes binding and shall be entered as a judgment, if it is on all of the issues or accepted as a joint stipulation if on part of the issues.¹²¹

In the event that a non-binding arbitration determination is rejected, all documentary evidence introduced at the arbitration is to be returned to the parties and the determination and acceptances and rejections sealed and filed in the case file.¹²²

I. Arbitrability of Punitive Damages

The Indiana Uniform Arbitration Act provides that the fact that the relief granted was such that it could not or would not be granted by a court of law or equity is not a ground for vacating or refusing to confirm an arbitration award.¹²³ Indiana courts have nevertheless held that arbitrators may not award punitive damages.¹²⁴ These decisions are based upon the public policy that the

115. *Id.*

116. IND. A.D.R. RULE 3.4(E).

117. *Id.*

118. *Id.*

119. *Id.*

120. *Id.*

121. *Id.*

122. *Id.*

123. IND. CODE § 34-4-2-13(a) (1993).

124. *School City of East Chicago v. East Chicago Fed'n of Teachers Local 511*, 422

underlying purpose of punitive damages is to deter future misconduct and punish wrongdoers and not to compensate parties for damages or injuries received. Because, prior to the ADR Rules, arbitration arose only out of contractual relationships, Indiana courts held that parties could not contract to benefit from or to be penalized by punitive damages.

There is, however, an important distinction between common law and statutory arbitration and arbitration under the ADR Arbitration Rules. Common law arbitration, arbitration under the Indiana Arbitration Act and under the Indiana Uniform Arbitration Act each required a contract, either written or oral. The contract or agreement in ADR arbitration arises *after* a lawsuit has already been filed. To the extent that claims for punitive damages are at issue in the existing litigation at the time of the Arbitration Agreement, it would appear that the parties could agree to arbitrate those issues. In other words, even though parties to a dispute cannot agree *in advance* of a lawsuit to arbitrate issues of punitive damages, they may agree to submit issues of punitive damages *already existing* in a lawsuit to arbitration under the ADR Arbitration Rules.¹²⁵ If Indiana courts adopt this interpretation and allow the arbitration of punitive damage claims, the arbitrator's discretion and authority under the ADR Rules is vast.

J. Scope of Arbitrator's Authority

Although the issues which the arbitrator could resolve at common law and under statutory arbitration were limited to those specified in the arbitration agreement, the arbitrator had wide discretion in connection with the manner in which he or she decided those issues.¹²⁶ Prior to the ADR Arbitration Rules, Indiana courts joined courts of other jurisdictions in granting to arbitrators wide discretion in the remedies and results that arbitrators could reach. The arbitrators were not restricted by provisions of substantive law but rather could exercise a general sense of equity or fairness.¹²⁷

The scope of authority of arbitrators under the ADR Arbitration Rules is delineated both by the issues framed in the lawsuit and by the Arbitration Agreement. Parties to litigation can agree to submit to arbitration not only all the issues in the lawsuit but also issues between them which might not have been

N.E.2d 656 (Ind. Ct. App. 1981); *Underwriting Members of Lloyd's of London v. United Home Life Ins. Co.*, 549 N.E.2d 67 (Ind. Ct. App. 1990), adopted 563 N.E.2d 609 (Ind. 1990).

125. See also Note, *Punitive Damages in Arbitration: The Second Circuit on a Collision Course with the U.S. Supreme Court*, 8 OHIO ST. J. ON DISP. RESOL. 385 (1993); E. Allan Farnsworth, *Punitive Damages in Arbitration*, 20 STETSON L. REV. 395 (1991).

126. *Gary Teachers Union, Local 4 v. Gary Com. Sch. Corp.*, 512 N.E.2d 205; *Int'l Bhd. of Elec. Workers, Local 1400 v. Citizens Gas & Coke Util.*, 428 N.E.2d 1320 (Ind. Ct. App. 1981); IND. CODE § 34-4-2-13(a)(5) (1993).

127. *School City of E. Chicago, Indiana v. East Chicago Fed. of Teachers, Loc. 511*, 422 N.E.2d 656 (Ind. Ct. App. 1981).

included within the scope of the litigation. The arbitrator has the discretion under the ADR Arbitration Rules (as existed at common law and under prior statutory arbitration) to resolve the issues in a manner that the arbitrator decides is "equitable," even if that manner is not necessarily within the confines or restrictions of substantive law provisions. Although this issue is not specifically addressed in the ADR Arbitration Rules, it is submitted that the case law which developed under the common law and statutory arbitration should be of guidance. Under those decisions, arbitrators are *not* restricted to remedies and relief allowed by substantive law provisions. When interpreting the Indiana Uniform Arbitration Act, Indiana courts have consistently held that the fact that the arbitrator did not "follow the law" is not necessarily grounds for reversal or challenge of the award.¹²⁸

K. Subpoenas

ADR Arbitration Rule 3 does not make any provision for the issuance of subpoenas. Presumably, the provisions of the Indiana Arbitration statute and the Indiana Uniform Arbitration Act will be applicable. Again, Rule 3.4(B) specifically provides that the parties are "encouraged to use the provisions of Indiana's Arbitration Act¹²⁹ and the Uniform Arbitration Act¹³⁰ to the extent possible and appropriate under the circumstances."¹³¹ Although it is not clear whether this reference is limited to the area concerning submissions of materials (the area in which the reference is made) or whether the reference is more broad, it can be argued that the non-contradictory provisions of the two previously existing statutes should be applicable to ADR arbitration.

The Indiana Arbitration Act provides that parties may be required to attend before hearings arbitrators upon the issuance of subpoenas issued by any justice of the peace on behalf of either party.¹³² The Indiana Uniform Arbitration Act also provides that arbitrators may issue subpoenas for the attendance of witnesses and for the production of books, records, documents and other evidence.¹³³ Because the right to present testamentary evidence in arbitration could be illusory without subpoena power, it is presumed that the Indiana Supreme Court will provide access to pre-existing statutes providing the power to issue subpoenas in arbitrations.

128. *Id.* As indicated, IND. CODE § 34-4-1-13, which provides the grounds for vacating an arbitration award, specifically provides that the fact that the relief could not have been granted by a court of law or equity would not be grounds for vacating or refusing to confirm the award.

129. IND. CODE § 34-4-1-1, *et seq.*

130. IND. CODE § 34-4-2-1, *et seq.*

131. IND. A.D.R. RULE 3.4(B).

132. IND. CODE § 34-4-1-7 (1993).

133. IND. CODE § 34-4-2-8(a) (1993).

*L. Post Determination Proceedings: Appeals from
ADR Arbitration*

The ADR Arbitration Rules do not make any provision for appeals or post-determination proceedings. Clearly, if the parties have elected non-binding arbitration, the parties will either accept the arbitration determination or proceed with the litigation.¹³⁴ The above cited rule provision encouraging the parties to "use" the previous statutes would support an argument that the "appellate" provisions of the prior arbitration statutes will be applicable to ADR Arbitration.

One obstacle to this interpretation is that ADR Arbitration Rule 3.4(E) provides that the arbitration award or determination shall be made within 20 days after the hearing and, that after the rendering of the award, "the court shall enter judgment on the determination."¹³⁵ In contrast, the Indiana Uniform Arbitration Act specifically provides that judgment should *not* be entered by the court until at least ninety days after the rendering of the arbitration award.¹³⁶ During this ninety day waiting period, parties have the right to file either an application to vacate the award or an application to modify or correct an award.¹³⁷ Under the Indiana Uniform Arbitration Act, after the expiration of the 90 days and after the entry of judgment, parties then have limited rights of appeals. Appeals can be taken from:

- 1) an order denying an application to compel arbitration;
- 2) an order granting an application to stay arbitration;
- 3) an order confirming or denying confirmation of an award;
- 4) an order modifying or correcting an award;
- 5) an order vacating an award without directing a rehearing; or
- 6) a judgement or decree entered pursuant to the UAA.¹³⁸

The appeals from the Indiana Uniform Arbitration Act awards are to be taken in the manner and to the same extent as any civil action.¹³⁹

One of several conclusions could be reached in attempting to reconcile the provisions of the Indiana Uniform Arbitration Act and the Indiana ADR Arbitration rule provisions: First, it could be argued that even though the ninety day waiting period of the Indiana Uniform Arbitration Act is not contained in the ADR Arbitration Rules, such a period should be presumed. The ADR Arbitration Rules do not state *when* the court shall enter a judgment after an award. Under such an interpretation, the parties to a binding ADR Arbitration proceeding would have ninety days in which to file the application for vacation

134. Conceivably, appeal issues could be raised if a party intends, but fails, to reject the arbitration award within the 20 days period.

135. IND. A.D.R. RULE 3.4(E).

136. IND. CODE § 34-4-2-12 (1993).

137. IND. CODE § 34-4-2-13 (1993); IND. CODE § 34-4-2-14 (1993).

138. IND. CODE § 34-4-2-19(a)(1)-(6) (1993).

139. IND. CODE § 34-4-2-19(b) (1993).

or modification contemplated by the Indiana Uniform Arbitration Act. The second interpretation which could be reached is that the ninety day waiting period should not be grafted onto the ADR Arbitration Rules. Rather, the court should enter judgment immediately after the award and the parties would then have the general—but limited—right to appeal from the judgment entered on that award.

The problem with the second interpretation is that Indiana appellate decisions have limited the scope of appellate review from arbitration awards to the "grounds for challenge" permitted by sections 12 to 14 and 19 of the Indiana Uniform Arbitration Act.¹⁴⁰ If the "grounds" for vacation of an award pursuant to Indiana Code section 34-4-2-13 or for modification or correction of award pursuant to Indiana Code section 34-4-2-14 are not specifically deemed to be applicable to arbitration under the ADR Arbitration Rules, the right of appeal could be more limited than under the Indiana Arbitration Act. The general right of appeal contained in Indiana Code section 34-4-2-19, allowing appeals from a judgment or decree entered pursuant to the provisions of the Indiana Uniform Arbitration Act would presumably be applicable.

Should the parties in their Arbitration Agreement provide whether the ninety day period vacation and modification provisions apply? Although it is not clear that the parties are free to contract to that degree, such provisions should probably be included in the Arbitration Agreement.¹⁴¹

M. Scope of Appellate Review of Arbitration Awards

Two general types of arbitration exist in the United States; non-binding or advisory arbitration in which, after award, a displeased party has a right to a trial *de novo*, and binding arbitration in which no right to reject exists. In the latter, either by rule, statute or court decision, the scope of appellate review is limited.¹⁴²

140. *State Dep't of Admin. Personnel Div. v. Sights*, 416 N.E.2d 445 (Ind. Ct. App. 1981); *Indianapolis Pub. Transp. Corp. v. Amalgamated Transit Union, Local 1070*, 414 N.E.2d 966 (Ind. Ct. App. 1981).

141. *See Konicki v. Oak Brook Racquet Club, Inc.*, 441 N.E.2d 1333 (Ill. Ct. App. 1982) (holding that parties could not by agreement expand a trial court's limited power to review awards). *But see contra*, *Monte v. Southern Delaware County Auth.*, 335 F.2d 855 (3rd Cir. 1964). Another problem with applying the ninety day period of time to all binding ADR arbitration is that it creates an automatic three month delay between award and enforcement if the parties do not voluntarily accept the award.

142. *See George H. Friedman, Correcting Arbitrator Error: The Limited Scope of Judicial Review*, 33 ARB. J. 9 (Dec. 1978); Brad A. Galbraith, *Vacatur of Commercial Arbitration Awards in Federal Court*, 27 IND. L. REV. 241 (1993). *See also Schaefer et al. v. Allstate Ins. Co.*, 590 N.E.2d 1242 (Ohio 1992). In *Schaefer*, the Supreme Court of Ohio held that "non-binding arbitration" was a contradiction in terms and found unenforceable an agreement to arbitrate which provided that the arbitration was non-binding and that the parties had a right to a trial *de novo* if either was not satisfied with the arbitration result. It could be argued that the possible extension

Although many different standards, tests and grounds exists, it can be generally stated that in the majority of jurisdictions the scope of an arbitration award is limited to:

- 1) questions of jurisdiction;
- 2) issues concerning regularity of proceedings;
- 3) questions of awards in excess of arbitration powers; and
- 4) constitutional questions.¹⁴³

Indiana courts have followed the majority of jurisdictions in holding that the purpose of arbitration generally (and the specific purpose of the Uniform Arbitration Act) is to allow parties to reach resolution of their disputes by earlier and quicker methods. Strict and limited judicial review is necessary to avoid frustration of these goals.¹⁴⁴

Several general principles should be found applicable to issues of review of arbitration awards under the ADR Arbitration Rule:

1. The award will be presumed to be based on proper grounds.¹⁴⁵
2. The fact that arbitrator did not "follow the law" will not be a ground for review, unless the Arbitration Agreement specifically so limited the arbitrator's authority.¹⁴⁶
3. Courts can review arbitration award on the basis of fraud and corruption, or if the arbitrators have ordered that an illegal act be done.¹⁴⁷
4. Courts can refuse to enforce arbitration awards when enforcement of the award would violate public policy.¹⁴⁸
5. Awards can be voided if the arbitrator or arbitrators were clearly not impartial.¹⁴⁹

of the holding in the *Schaefer* case could be that non-binding ADR arbitration is merely an evaluation tool or device without legal effect, and that if there is an *agreement* to arbitrate on a binding basis, all such proceedings should be governed by the Indiana Uniform Arbitration Act. Such an interpretation, however, ignores the clear and specific provisions of the Indiana Arbitration Rules and the manner and degree to which they differ from the Indiana Uniform Arbitration Act.

143. *Appeal of Borough of Hollidaysburg*, 453 A.2d 684 (Commw. Ct. 1982); *Sindler v. Batleman*, 416 A.2d 238 (D.C. 1980).

144. *MSP Collaborative Developers v. Fidelity & Deposit Co. of Maryland*, 596 F.2d 247 (7th Cir. 1979); *Indianapolis Pub. Transp. Corp. v. Amalgamated Transit Union, Loc. 1070*, 414 N.E.2d 966 (Ind. Ct. App. 1981).

145. *Saturday Evening Post Co. v. Rumbleseat Press, Inc.*, 816 F.2d 1191 (7th Cir. 1987).

146. *School City of E. Chicago, Ind. v. East Chicago Fed'n of Teachers, Loc. No. 511*, 422 N.E.2d 656 (Ind. Ct. App. 1981).

147. *Hill v. Norfolk & Western Ry. Co.*, 814 F.2d 1192 (7th Cir. 1987).

148. *Irving Materials, Inc. v. Coal, Ice Bldg. Material & Supply Drivers, Heavy Haulers, Warehousemen & Helpers, Loc. 716*, 779 F. Supp. 968 (S.D. Ind. 1992).

149. IND. CODE § 34-4-2-13(a)(2) (1993).

6. Courts can review arbitration awards on the grounds that the Arbitration Agreement was not followed.¹⁵⁰

An examination and analysis of the common law cases, the arbitration statutes, and cases decided thereunder, and the ADR Arbitration Rules support the conclusion that appeals from binding ADR arbitration are very limited. This limited appellate review can only be realized if the modification and vacation provisions of the Indiana Uniform Arbitration Act are deemed to be applicable to results of binding arbitration under the ADR Arbitration Rules.

Until the issue is settled or the rules amended, practitioners faced with binding arbitration awards from which they would like to appeal might consider attempting a combined approach by following the provisions of both Indiana Code section 34-4-2-13, 13, 14 and 19 *and* following regular appellate rules, including Trial Rules 59, 60 and 62.¹⁵¹

IV. CONCLUSION

The ADR Arbitration Rules provide Indiana lawyers with a significant new tool. The lawyers and parties have significant discretion under Rule 3 to design the arbitration procedure. They can decide whether the arbitration will be binding or non-binding. They can agree what issue or issues will be arbitrated, what procedures will be followed and who will be the arbitrator or arbitrators. Also, the application of discovery rules to arbitration under the ADR Arbitration Rules will eliminate one major reason many lawyers were reluctant to agree to arbitration.

Subsequent decisions or amendments will be necessary to determine the precise limits on the parties' right to mold the arbitration procedure and on the scope and nature of appellate review of arbitration awards. With such decisions or amendments, Indiana arbitration law and procedure will continue its evolution.

150. *International Bhd. of Elec. Workers, Loc. 1400 v. Citizens Gas & Coke Util.*, 428 N.E. 1320 (Ind. Ct. App. 1981); IND. CODE § 34-4-2-14(a)(2). This authority, however, may be limited because of the fact that the Arbitration Agreement contemplated by the ADR Arbitration Act is substantially different than the agreements to arbitrate at common law, under the Indiana Arbitration Act and the Indiana Uniform Arbitration Act. There are, however, restrictions and limitations that can be placed on the arbitrators in the ADR Arbitration Agreement. For example, the parties could agree to submit any of two issues to arbitration and the award could include a decision on both issues.

151. IND. TR. R. 59, 60, 62.

BANKRUPTCY IN THE SEVENTH CIRCUIT: 1993

DOUGLASS G. BSHKOFF*

This Article surveys the work of the Seventh Circuit between December 27, 1992 and November 30, 1993. During this period, the Court addressed a number of issues. Only the most significant opinions are discussed here.

I. DEBTOR ELIGIBILITY

In re Estate of Medcare HMO,¹ is certain to attract substantial attention outside the Seventh Circuit because it is the first appellate opinion to consider whether a health maintenance organization (HMO) is eligible for bankruptcy. *Medcare* decided that an HMO does not qualify because, as an insurance company, it is excluded from the category of eligible debtors by 11 U.S.C. § 109(b)(2).²

Even though this exclusion dates from 1910,³ Congress has never provided statutory guidance as to what constitutes an ineligible "insurance company." Courts have, therefore, developed several tests to fill this definitional void. Most popular is the "state classification" test under which companies are excluded either if they are defined as insurance companies by state law or if they are the substantial equivalent of such entities.⁴ In *Medcare*, the Seventh Circuit decided that each branch of the state classification test had been satisfied. The debtor (1) was considered an insurance company by Illinois law and (2) provided insurance protection to its clients. At the same time, the court refused to apply two other tests—the "independent classification" test and the "alternative relief" test—to the facts of the case, reasoning that "the classification of an entity should

* Robert H. McKinney Professor of Law, Indiana University—Bloomington.

1. 998 F.2d 436 (7th Cir. 1993).

2. *Id.* at 437. 11 U.S.C. § 109(b) states:

(b) A person may be a debtor under chapter 7 of this title only if such person is not—

(1) a railroad;

(2) a domestic insurance company, bank, savings bank, cooperative bank, savings and loan association, building and loan association, homestead association, credit union, or industrial bank or similar institution which is an insured bank as defined in section 3(h) of the Federal Deposit Insurance Act (12 U.S.C. 1813(h)); or

(3) a foreign insurance company, bank, savings bank, cooperative bank, savings and loan association, building and loan association, homestead association, or credit union, engaged in such business in the United States.

3. 1 COLLIER ON BANKRUPTCY § 4.01[2.3] (14th ed. 1974).

4. See, e.g., *Cash Currency Exchange v. Shine*, 762 F.2d 542 (7th Cir. 1985) (currency exchange eligible for bankruptcy because it was not classified as a bank by state law and was not authorized to accept deposits).

generally follow the law of the state of its incorporation, so long as that classification does not frustrate the purposes of the Code.”⁵

This heavy reliance on state law seems appropriate in light of Congress’ longstanding deference to state regulation of the insurance business. Whether continued deference to state law is wise in light of the increase in interstate insurance activity is more problematic.⁶ It is, nevertheless, clear that any significant change in the law governing rehabilitation and liquidation of insurance companies will have to come through congressional action. As the court observed near the close of its opinion, “Congress was certainly aware of the potential for inconsistent insolvency regimes, but obviously concluded that the interest in continuing state regulation into insolvency outweighed any interest in uniformity. We will not second guess that determination.”⁷

II. POWERS OF AVOIDANCE

Bankruptcy Code § 547(b) permits avoidance of a broad range of preferential transfers, so broad that Congress has provided protection for seven different types of otherwise avoidable transactions in 11 U.S.C. § 547(c). Section 547(c)(2), for example, prevents avoidance of certain routine pre-bankruptcy payments to creditors. To obtain the protection of § 547(c)(2), the preferred creditor must show that (A) the debt was incurred in the ordinary course of business, and that the payment was “(B) made in the ordinary course of business or financial affairs of the debtor and the transferee; and (C) made according to ordinary business terms. . . .”⁸ Element (B) is established by showing that the transaction was subjectively routine.⁹ Courts divide on the question of whether element (C) is also subjective or whether the statute imposes an objective, industry-wide standard for measuring the conduct of the parties.¹⁰ One leading bankruptcy treatise argues for a purely subjective interpretation:

In any event, we do not read into (c)(2) an objective component requiring that payment be made in accordance with general industry or trade customs or practices. To read it otherwise requires that creditors conform, at least when the debtor appears in financial trouble, to a vague community standard that cannot readily (if ever) be determined in advance. Yet, that is the worst time to change the comfortable and, perhaps, more flexible pattern the parties have established for them-

5. *Medcare HMO*, 998 F.2d at 442.

6. See Colette B. Resnik, *Maxicare As a Guide For Health Maintenance Organizations (HMOs) In Bankruptcy*, 8 BANKR. DEV. J. 271, 287-89 (1991).

7. *Medcare*, 998 F.2d at 447.

8. 11 U.S.C. § 547(c)(2) (1988).

9. *WJM, Inc. v. Massachusetts Dep’t of Pub. Welfare*, 840 F.2d 996 (1st Cir. 1988).

10. *Lovett v. St. Johnsbury Trucking*, 931 F.2d 494 (8th Cir. 1991) (subjective standard); *First Federal of Michigan v. Barrow*, 878 F.2d 912 (6th Cir. 1989) (objective standard).

selves. Even if the community standard is not, in fact, more rigid, making any change requires the creditor accurately to define and properly to comply with an ambiguous and distant standard. The odds are against the creditor whose natural reaction may well be to abandon the debtor when the debtor most needs continuing credit.¹¹

Prior to *Matter of Tolona Pizza Products Corp.*¹² the proper interpretation of element (C) was an open question in the Seventh Circuit. *Tolona* decided that this term requires consideration of industry practice.¹³ However, it defines that practice so broadly that the parties probably have as much freedom under this objective standard as they would have under a completely subjective standard. The court stated:

We conclude that "ordinary business terms" refers to the *range* of terms that encompasses the practices in which firms similar in some general way to the creditor in question engage, and that only dealings so idiosyncratic as to fall outside that broad range should be deemed extraordinary and therefore outside the scope of subsection C. . . . There is no single set of terms on which the members of the industry have coalesced; instead there is a broad range and the district judge plausibly situated the dealings between Rose and Tolona within it.¹⁴

III. CLAIMS

Rule 15 of the Federal Rules of Civil Procedure is made applicable in bankruptcy proceedings by Bankruptcy Rule of Procedure 7015.¹⁵ The rule permits amendment of pleadings and other documents, including proofs of claim. Either leave of court or consent of the adverse party is required and the rule instructs that "leave shall be freely given when justice so requires."¹⁶ The Seventh Circuit has been struggling since 1991, without much success, to provide a coherent explanation of the circumstances in which amendment should be permitted.

In re Unroe,¹⁷ criticized in the *Indiana Law Review* in 1992,¹⁸ allowed a tardy amendment by the Internal Revenue Service, even though the Service provided no justification for its late claim. A few months later, *In re Stavriotis*¹⁹

11. 1 DAVID G. EPSTEIN ET AL., BANKRUPTCY 619 (1992).

12. 3 F.3d 1029 (7th Cir. 1993).

13. *Id.* at 1033.

14. *Id.*

15. Fed. R. Bankr. P. 7015.

16. Fed. R. Civ. P. 15.

17. 937 F.2d 346 (7th Cir. 1991).

18. Douglass G. Boshkoff, *Bankruptcy in the Seventh Circuit: 1991*, 25 IND. L. REV. 981, 985-86 (1992).

19. 977 F.2d 1202 (7th Cir. 1992).

refused to allow amendment of an IRS claim. *Unroe* was cited in *Stavriotis* but not discussed at any length.²⁰ These opposite results can be reconciled on the ground that, in each instance, the Court of Appeals decided to defer to the decision of the bankruptcy judge.

However, this rationale cannot explain the result in two recent decisions. *Holstein v. Brill*²¹ rejected a post confirmation amendment of a proof of claim, notwithstanding the Seventh Circuit's recognition that the action of the trial court was a decision to which "appellate review is deferential."²² Both *Unroe* and *Stavriotis* are cited as examples of "the exercise of reasoned discretion."²³ Most recently, *In re Stoecker*²⁴ indicated disagreement with a bankruptcy judge's rejection of a proof of claim without leave to amend. *Unroe* was cited without discussion, *Holstein* was ignored, and *Stavriotis* was distinguished as being "not to the contrary."²⁵

Even with four decisions in less than three years, the Seventh Circuit still does not have a well defined position on the amendment of proofs of claim. More appeals can be expected until the court articulates a clear position on this issue.

IV. DISCHARGE

For much of the twentieth century, conduct alone determined whether a debtor would receive rehabilitative relief. Discharges were granted, denied, or revoked solely because of what the debtor did, or did not do, before and during bankruptcy. So also, the debtor's conduct determined whether a specific obligation could be discharged. The debtor's ability to pay was ignored.²⁶ All this began to change in 1976, when Congress provided that educational loans would be nondischargeable for a limited period of time unless repayment would constitute an "undue hardship."²⁷ For the first time, the debtor's prospective ability to satisfy obligations was to be considered in determining whether discharge of debt was appropriate. Since 1976, prospective ability to satisfy present obligations has been incorporated in two other code provisions; the substantial abuse dismissal rule of 11 U.S.C. § 707(b), and the disposable income confirmation requirement found in 11 U.S.C. § 1325(b). It is quite possible that our bankruptcy law in the twenty-first century will move away from conduct-

20. *Unroe* is cited without comment at 977 F.2d at 1204, and then briefly discussed at 977 F.2d at 1206 n.4.

21. 987 F.2d 1268 (7th Cir. 1993).

22. *Id.* at 1270.

23. *Id.*

24. 5 F.3d 1022 (7th Cir. 1993).

25. 5 F.3d at 1028.

26. See Douglass G. Boshkoff, *Limited Conditional And Suspended Discharges In Anglo-American Bankruptcy Proceedings*, 131 U. PA. L. REV. 69, 73 (1982).

27. 3 COLLIER ON BANKRUPTCY ¶ 523.18 (15th ed. 1993).

based discharge rules and place greater reliance on prospective ability to pay. Student loan dischargeability litigation, therefore, is particularly interesting for the insights it offers concerning the content of discharge rules which rely, at least in part, upon ability to pay concepts.

The message for future debtors is daunting. Courts have not favored student borrowers. “‘Undue hardship’ has proved to be a very small hole through which only the most pitiful of bankrupt students have been able to escape from the general rule of nondischargeability.”²⁸

*In re Roberson*²⁹ announced the Seventh Circuit view of what constitutes the “undue hardship” required by 11 U.S.C. § 523(a)(8) for the immediate discharge of an educational debt. In *Roberson*, the court decided to follow the Second Circuit and require a tripartite showing that: (1) there is a present inability to maintain a minimal standard of living, (2) this situation is likely to persist for a significant time and (3) the debtor has made a good faith effort to repay the loans.³⁰ While Mr. Roberson currently was unemployed and without a driver’s license, the bankruptcy court found, and the Seventh Circuit agreed, that this situation was not likely to continue indefinitely.³¹ Therefore, the educational loan was not presently dischargeable. Although discharge of the educational debt was denied, the bankruptcy court’s order did provide the debtor some relief. The temporary loss of earning power was handled through a two year moratorium on collection activity, coupled with the right to renewed consideration of the undue hardship issue if the debtor’s financial condition failed to improve.³²

Roberson suggests that it will be very difficult to establish “undue hardship” in the Seventh Circuit. Something akin to abject and permanent misery more probably approximates the applicable standard for relief through immediate discharge of educational obligations.

V. EXEMPTIONS

Bankruptcy Rule 4003(b) establishes a time limit for objections to exemptions by either the trustee or any creditor. In *Taylor v. Freeland & Kronz*,³³ the Supreme Court recently decided that this time limit must be observed even when there is absolutely no legal basis for the exemption claim. The holding in *Taylor* emphasizes a literal approach to the language of the rule and is consistent with the Court’s general approach to the interpretation of the bankruptcy statute.

28. 2 DAVID G. EPSTEIN ET AL., BANKRUPTCY 394 (1992).

29. 999 F.2d 1132 (7th Cir. 1993).

30. *Id.* at 1135.

31. *Id.* at 1137.

32. *Id.* at 1134.

33. 112 S. Ct. 1644 (1992).

*In re Kazi*³⁴ demonstrated that the Seventh Circuit is prepared to follow the Supreme Court's lead and strictly apply the requirements of Bankruptcy Rule 4003(b). In *Kazi*, the trustee failed to file a written objection within the prescribed time. However, the debtor had received timely actual notice of the trustee's objection. Adhering faithfully to the principle articulated in *Taylor*, the court held that the actual notice of the objection was irrelevant.³⁵

If the time limit of Rule 4003(b) is to be interpreted literally, it follows that the requirement of written objections should also be interpreted literally. It would be inconsistent with *Taylor's* emphasis on finality to allow objecting parties to raise the issue of the debtors' actual notice of opposition to claimed exemptions after the 30-day period has run.³⁶

*In re Bianucci*³⁷ reached a result less favorable to debtors. The court affirmed the bankruptcy judge's refusal to reopen a case for the purpose of lien avoidance pursuant to 11 U.S.C. § 522(f) and Bankruptcy Rule 4003(d).³⁸ It should be noted that subdivision (d) does not establish a time period for lien avoidance. Nonetheless, the lower court thought that the motion to reopen was untimely.

Two aspects of *Bianucci* are noteworthy. First, the court and counsel apparently assumed that reopening was a prerequisite to avoidance, although there is case authority³⁹ and scholarly opinion supporting avoidance without reopening.⁴⁰ The better practice is to permit the use of § 522(f) at any time, even if the case has been closed. Section 522(f) establishes a legal right which can be enforced by federal courts in the same fashion as any other federally created right. Since individual debtors often have difficulty paying legal fees, courts should attempt to develop legal rules which protect individual debtors at the least possible cost. Reopening an estate for the purpose of lien avoidance is an unnecessary formality.

The timeliness of lien avoidance was also an issue in *Bianucci*. The debtor waited five months before taking any action to avoid the lien. During this period, the lien creditor incurred some litigation expenses. Affirming the bankruptcy judge's refusal to allow lien avoidance, the court took a dim view of the debtor's inaction.⁴¹ Waiting, however, may be the wisest and least expensive course of action for a debtor. The Bianuccis had hoped that the lien

34. 985 F.2d 318 (7th Cir. 1993).

35. *Id.* at 320-22.

36. *Id.* at 322.

37. 4 F.3d 526 (7th Cir. 1993).

38. *Id.* at 529.

39. *E.g., In re Keller*, 24 B.R. 720 (Bankr. N.D. Ohio 1982); *In re Schneider*, 18 B.R. 274 (Bankr. N.D. 1982).

40. *E.g.*, 8 COLLIER ON BANKRUPTCY ¶ 4003.06 (15th ed. 1993); HENRY J. SOMMER & GARY KLEIN, CONSUMER BANKRUPTCY LAW AND PRACTICE § 10.4.2.2 (4th ed. 1992).

41. *In re Bianucci*, 4 F.3d at 529.

would become unenforceable with the passage of time.⁴² It is not at all clear why inaction thus justified should be equated with bad faith.

VI. CHAPTER 13

Circuits differ in their views on the preclusive effect of a Chapter 13 plan.⁴³ *In re Pence*,⁴⁴ decided three years ago, suggested that the Seventh Circuit would be reluctant to allow collateral challenges to the treatment of secured claims in a confirmed plan. *In re Chappell*⁴⁵ reaffirms the court's commitment to principles of finality.

In *Chappell*, the debtor proposed a plan providing for 100% payment of a second mortgage. Both the plan and the mortgagee's proof of claim valued the claim at \$20,661.20. This amount represented principal alone. After the Chapter 13 case had been closed, the mortgagee attempted to collect interest through a foreclosure action in state court. The bankruptcy case was then reopened for a determination of the second mortgagee's rights. The bankruptcy court decided that the entitlement to interest was lost when the creditor, aware of the problem, neglected to press the issue during the Chapter 13 proceeding.⁴⁶ Quoting with approval from its decision in *Pence*, the Seventh Circuit affirmed the ruling below, and reiterated the view that, absent fraudulent circumstances, tardy challenges to a confirmed chapter 13 plan are not likely to succeed.⁴⁷

42. *Id.* at 529 n.3.

43. See KEITH M. LUNDIN, CHAPTER 13 BANKRUPTCY § 6.9 (1992).

44. 905 F.2d 1107 (7th Cir. 1990). See Douglass G. Boshkoff, *Bankruptcy in the Seventh Circuit: 1989-1990*, 24 IND. L. REV. 551, 567 (1991) for a discussion of this case.

45. 984 F.2d 775 (7th Cir. 1993).

46. *Id.* at 778-79.

47. *Id.* at 783.

RECENT DEVELOPMENTS IN CONTRACT AND COMMERCIAL LAW

JUDY L. WOODS*

BRAD A. GALBRAITH**

INTRODUCTION

This Article surveys the most significant developments in Indiana contract and commercial law from January 1, 1993 through September 30, 1993. The opinions reviewed include both Indiana decisions and federal court decisions construing Indiana law.

I. UNIFORM COMMERCIAL CODE—APPLICATION OF ARTICLE 2

On April 20, 1993, the Indiana Supreme Court resolved a disagreement among the districts of the Indiana Court of Appeals¹ regarding the application of Article 2 of the Uniform Commercial Code to transactions involving both sales of goods and performance of services.² The scope provisions of Article 2 do not clearly include or exclude these "mixed" or "hybrid" transactions,³ and as a result, disputes often arise as to the applicability of the provisions of the UCC.⁴ Because Article 2 provides many benefits which the common law does

* Partner, McTurnan & Turner, Indianapolis. B.A., 1973, Macalester College; M.A., 1978, Bryn Mawr College; J.D., 1987, Indiana University School of Law—Indianapolis.

** B.S., 1988, Indiana University; J.D., 1994, Indiana University School of Law—Indianapolis.

1. See *Data Processing Serv., Inc. v. L.H. Smith Oil Corp.*, 492 N.E.2d 314 (Ind. Ct. App. 1986); *Insul-Mark Midwest, Inc. v. Modern Materials, Inc.*, 594 N.E.2d 459 (Ind. Ct. App. 1992), modified, 612 N.E.2d 550 (Ind. 1993). See discussion *supra*, Parts I.A. and I.B.

2. For a discussion of various types of transactions involving both sales of goods and provision of services, see Sonja A. Soehnel, Annotation, *Applicability of UCC Article 2 to Mixed Contracts for Sale of Goods and Services*, 5 ALR 4th 501 (1981). See also *Matthews v. Metropolitan Contract Carpets*, 1988 WL 124900 (E.D. Pa. 1988) (installation of wooden floor); *Grossman v. Aerial Farm Serv., Inc.*, 384 N.W.2d 488 (Minn. Ct. App. 1986) (aerial application of herbicide); *McCool v. Hoover Equip. Co.*, 415 P.2d 954 (Okla. 1966) (chroming of crankshafts); *Perlmutter v. Beth David Hosp.*, 123 N.E.2d 792 (N.Y. 1954) (transfusion of blood).

3. IND. CODE § 26-1-2-102 (Supp. 1992) provides in relevant part: "Unless the context otherwise requires, I.C. § 26-1-2 applies to transactions in goods." The term "goods" is defined by IND. CODE § 26-1-2-105(1) (1988): "'Goods' means all things (including specially manufactured goods) which are movable at the time of identification to the contract for sale" Article 2 does not, however, address whether it should be applied to transactions involving both goods and services.

4. The definition of goods contained in IND. CODE § 26-1-2-105(1) specifically includes specially manufactured goods. As the Sixth Circuit Court of Appeals explained in *Wells v. 10-X Mfg. Co.*, 609 F.2d 248 (6th Cir. 1979), although "[i]t is clear that Article 2 of the Code is intended to have broad application. . . it also follows from the Code's continued focus on 'goods,' the definition of which is cast in terms of a 'contract for sale,' that a contract which calls merely for the rendition of services is not subject to the sales provisions of the Code." *Id.* at 254. "We conclude that, even in the context of a contract for special manufacture, initial inquiry should focus not on the fact of special manufacture, but on whether the contract is one for the sale of goods or one for the

not—such as warranties and remedies—the applicability determination can be a dispositive issue.

A. *Factual Background*

In the case of *Insul-Mark Midwest, Inc. v. Modern Materials, Inc.*,⁵ the Indiana Supreme Court adopted the “predominant thrust” test used by a majority of jurisdictions that have addressed this issue.⁶ The dispute in *Insul-Mark Midwest* arose after Insul-Mark contracted to have Modern Materials treat roofing fasteners with a fluorocarbon coating so that the fasteners would meet specified rust-resistance standards. Modern Materials received customer parts, processed them with various treatments, and returned them to the customer.⁷ Modern Materials invoiced these transactions with work orders rather than purchase orders and computed charges based upon the weight and length of fasteners treated.⁸ When the rust-resistant coating failed to meet the specified requirements, Insul-Mark brought suit against Modern Materials based in part upon breach of express and implied warranties of Article 2 of the UCC.⁹

The trial court granted Modern Materials’ motion for summary judgment on the warranty claims because it found the transactions between the parties were service contracts not subject to the warranty provisions of Article 2 of the UCC.¹⁰ On appeal, Judge Staton, writing for the Third District Court of Appeals, affirmed the trial court’s entry of summary judgment on the warranty claims, noting a split of authority among the Indiana Court of Appeals’ districts on the proper test for determining whether a transaction involving both sales of goods and rendition of services is within the scope of Article 2 of the UCC.¹¹ In order to resolve this conflict, the Indiana Supreme Court granted transfer.

B. *Two Approaches*

The two tests previously used by Indiana courts to determine whether Article 2 of the UCC applies to a transaction are generally referred to as the “bifurcation approach” and the “predominant thrust approach.”

1. *The Bifurcation Approach.*—An Indiana case which attempted to utilize the bifurcation approach was the Fourth District Court of Appeals decision in

rendition of services.” *Id.* Thus, the first inquiry—whether goods or services predominate—remains the same when a transaction involves specially manufactured goods.

5. 612 N.E.2d 550 (Ind. 1993).

6. *Id.* at 554.

7. *Id.* at 551.

8. *Id.* at 552.

9. *Id.* at 551.

10. *Insul-Mark Midwest, Inc. v. Modern Materials, Inc.*, 594 N.E.2d 459, 461 (Ind. Ct. App. 1992), *modified*, 612 N.E.2d 550 (Ind. 1993).

11. *Id.* at 462, 464.

*Data Processing Services, Inc. v. L.H. Smith Oil Corp.*¹² Under the bifurcation approach, “the portion of a transaction involving goods is governed by code principles, while those parts relating to the provision of services are controlled by the common law.”¹³

The bifurcation approach is not feasible in many situations and many problems may result from such an approach.¹⁴ For example, inconsistent application may occur when the transaction at issue is not easily divisible into goods and services portions (e.g., a contract for laying asphalt).¹⁵ Also, if the dispute concerns the creation of a contract, the bifurcation approach may result in enforcement of only the service portion of the contract while the goods portion is left unenforceable.¹⁶ Such a result would be contrary to the parties’ intent to enter into a single contract providing for both goods and services.¹⁷

2. *The Predominant Thrust Approach.*—In comparison to the bifurcation approach, the predominant thrust approach focuses on the parties’ expectations. In *Insul-Mark Midwest*, Chief Justice Shepard clearly sets forth the appropriate considerations when applying the predominant thrust approach to a mixed transaction.¹⁸ The “parties seeking the benefit of the code . . . bear the burden of establishing that the thrust of the transaction was predominantly for goods and only incidentally for services.”¹⁹ In establishing the thrust of the contract, one should look “to the language of the contract in light of the situation of the parties and the surrounding circumstances. Specifically, one looks to the terms describing the performance required of the parties, and the words used to describe the relationship between the parties.”²⁰ Next, one considers the “circumstances of the parties, . . . the primary reason they entered into the contract,” and the “final product the purchaser bargained to receive”²¹ “Finally, one examines the costs involved for the goods and services, and whether the purchaser was charged only for a good, or a price based on both

12. 492 N.E.2d 314 (Ind. Ct. App. 1986). See also *Stephenson v. Frazier*, 399 N.E.2d 794 (Ind. Ct. App. 1980).

13. *Insul-Mark Midwest*, 612 N.E.2d at 554 (citing *Stephenson v. Frazier*, 399 N.E.2d 794 (Ind. Ct. App. 1980)).

14. See Gerald L. Bepko, *Contracts, Commercial Law, and Consumer Law*, 14 IND. L. REV. 223, 224 (1981).

15. *Id.* This problem is especially evident in *Data Processing Serv., Inc. v. L.H. Smith Oil Corp.* where, as Judge Staton pointed out in *Insul-Mark Midwest, Inc. v. Modern Materials, Inc.*, 594 N.E.2d 459 (Ind. Ct. App. 1992), the court purported to apply the bifurcation approach, but instead applied common law to the entire transaction. “The effect was a de facto application of the predominant thrust doctrine.” *Insul-Mark Midwest*, 594 N.E.2d at 463 n.1.

16. Bepko, *supra* note 14.

17. *Id.*

18. 612 N.E.2d 550, 555 (Ind. 1993). For an early yet complete statement of the predominant thrust approach, see *Bonebrake v. Cox*, 499 F.2d 951 (8th Cir. 1974).

19. 612 N.E.2d at 555.

20. *Id.* (citations omitted).

21. *Id.*

goods and services. If the cost of the goods is but a small portion of the overall contract price, such fact would increase the likelihood that the services portion predominates."²² In *Insul-Mark*, application of these factors led the Indiana Supreme Court to conclude that the contract in question was primarily for services, and thus, the UCC should not be applied.²³

C. *Contracts for the Sale of Computer Software*

Although the Indiana Supreme Court has stated the appropriate factors to consider when determining whether to apply Article 2 to mixed transactions, application of this test to transactions involving computer software²⁴ is still unclear. Indiana's only reported case dealing with whether Article 2 applies to contracts involving computer software is *Data Processing Services, Inc. v. L.H. Smith Oil Corp.*²⁵ There, the court purported to apply the now-outdated bifurcation test, but actually used an analysis more consistent with the predominant thrust approach.²⁶ Data Processing Services was engaged to develop and implement a data processing system for Smith Oil's new computer. Smith Oil refused to pay for the system because even after several attempts by Data Processing Services to correct problems, the system did not work properly. Data Processing Services brought suit to recover the contract price. The trial court found the contract was for the sale of goods, and thus, applied Article 2.²⁷ On appeal, the Fourth District noted that the parties' language indicated the contract was for a transaction in services; the contract included no sale of computer hardware; Smith Oil bargained for Data Processing Services' skills, knowledge, and ability rather than for standardized software; and the means by which Data Processing Services' skills and knowledge were to be transferred to Smith Oil were incidental to the contract.²⁸ Because the means of transmission, a disk, which would otherwise be considered a "good," was not the essence of the transaction, the service portion of the contract predominated.²⁹ Thus, the Court of Appeals concluded that Article 2 of the UCC was not applicable.

The *Data Processing Services* case is cited by courts throughout the United States as authority for the proposition that customized software is a service rather than a good.³⁰ In contrast, the majority of courts have held that packaged

22. *Id.*

23. *Id.* at 556.

24. Computer software is defined as a medium that stores output and input data as well as programs—sets of statements or instructions to be used in a computer to perform various functions. See Federal Copyright Act, 17 U.S.C. § 101 (1988).

25. 492 N.E.2d 314 (Ind. Ct. App. 1986).

26. See *supra* note 15.

27. *Data Processing Serv., Inc.*, 492 N.E.2d at 316.

28. *Id.* at 318-19.

29. *Id.* at 319.

30. See, e.g., *Micro-Managers, Inc. v. Gregory*, 434 N.W.2d 97 (Wis. Ct. App. 1988).

software sales and combined hardware and software sales are sales of goods subject to Article 2.³¹ Thus, whether Article 2 of the UCC applies to a transaction in software appears currently to depend upon the type of software involved in the transaction. Three basic categories of software transactions exist: sales of pre-existing software, sales of custom software, and transactions where software is delivered through remote access.³²

1. *Transactions In Pre-Existing Software.*—Transactions in pre-existing software include both sales of operating system software, which often is sold along with and as part of the computer hardware system (e.g., Microsoft DOS), and sales of pre-packaged software (e.g. Lotus 1-2-3, WordPerfect). These types of transactions are typically deemed by the courts, without discussion, to be subject to the provisions of Article 2.³³

2. *Transactions In Custom Application Software.*—The second type of software transaction involves custom developed software. The courts' treatment of these transactions with regard to application of Article 2 has varied widely. For example, in *Micro-Managers, Inc. v. Gregory*,³⁴ the Wisconsin Court of Appeals was asked to determine whether a contract for the development of a custom computer program for Gregory was a contract for the sale of a good or for the rendition of a service.³⁵ The trial court reasoned that Article 2 of the UCC should apply because the contract was for the delivery of a "program," which was within the scope of Article 2's provision for specially manufactured goods.³⁶ The court of appeals, however, held that this contract was actually for

31. See, e.g., *RRX Industries, Inc. v. Lab-Con, Inc.*, 772 F.2d 543 (9th Cir. 1985) (computer software system contract requiring repair of "bugs" was a contract for goods); *Triangle Underwriters, Inc. v. Honeywell, Inc.*, 604 F.2d 737 (2d Cir. 1979), *aff'd*, 651 F.2d 132 (2d Cir. 1981) (sale of computer package including hardware, operating system software and custom application software deemed a contract for the sale of goods); *First Nationwide Bank v. Florida Software Serv., Inc.*, 770 F. Supp. 1537, 1543 (M.D. Fla. 1991); *D.P. Technology Corp. v. Sherwood Tool, Inc.*, 751 F. Supp. 1038, 1040 n.4 (D. Conn. 1990); *Chatlos Systems, Inc. v. National Cash Register Corp.*, 479 F. Supp. 738 (D.N.J. 1979), *modified*, 635 F.2d 1081 (3d Cir. 1980) (computer hardware and software sold as a package deemed sale of a good); *Neilson Bus. Equip. Ctr., Inc. v. Monteleone*, 524 A.2d 1172 (Del. 1987) (sale of a "turn-key" computer system deemed sale of a good); *Systems Design and Management Information, Inc. v. Kansas City Post Office Employees Credit Union*, 788 P.2d 878 (Kan. Ct. App. 1990) (computer software package deemed a sale of goods).

32. See Raymond T. Nimmer, Donald A. Cohn & Ellen Kirsch, *License Contracts Under Article 2 Of The Uniform Commercial Code: A Proposal*, 19 RUTGERS COMPUTER & TECH. L.J. 281, 307-12 (1993).

33. *Triangle Underwriters, Inc.*, 604 F.2d at 737 (sale of computer package including hardware, operating system software and custom application software deemed a contract for the sale of goods); *Chatlos Sys., Inc.*, 479 F. Supp. at 738 (computer hardware and software sold as a package deemed sale of a good); *Neilson Bus. Equip. Ctr., Inc.*, 524 A.2d at 1172 (sale of a "turn-key" computer system deemed sale of a good); *Communications Group, Inc. v. Warner Communications, Inc.*, 527 N.Y.S.2d 341 (N.Y. Civ. Ct. 1988).

34. 434 N.W.2d 97 (Wis. Ct. App. 1988).

35. *Id.* at 98.

36. *Id.* at 100.

the custom programming services provided rather than for the program itself.³⁷ The court looked to the method of billing and the language of the contract in making its determination.³⁸ Thus, Article 2 was deemed inapplicable, and Gregory was forced to rely on common law contract principles.

3. *Transactions in Remote Access Software.*—The final type of software transaction occurs when a purchaser obtains the use of the software through remote access transmission. Because this type of transaction has not been used as frequently as the other types of software transactions previously discussed, no appellate decisions dealing with remote access software are reported. This type of transaction does, however, raise the most interesting issues with regard to Article 2 in that the current Article 2 provisions for delivery, acceptance, and rejection cannot be applied when software is delivered via electronic communication lines without the exchange of any tangible good. Nonetheless, simply denying application of Article 2 to these transactions would be illogical. The essence of a remote access transaction is the same as any other software transaction—the purchaser desires the use of the computer program—and the method of delivery is merely incidental to the transaction.

D. Revision of Article 2

The American Law Institute ("ALI") and the National Conference of Commissioners on Uniform State Laws ("NCCUSL") are currently drafting a revision of Article 2 of the Uniform Commercial Code. Because software transactions do not easily fit within the current framework of Article 2, resulting in inconsistent application of the UCC among the states, the ALI and the NCCUSL have devoted a significant amount of thought to the treatment of software transactions under the proposed revision.

1. *Current Redraft of Article 2.*—The scope section of the redraft of Article 2 currently is written as follows:

(a) Unless the context otherwise requires, this Article applies to:

(1) any transaction, regardless of form, that creates a contract for the sale of goods, including a transaction in which a sale of goods predominates;

(2) any dispute relating to goods supplied under a transaction in which the sale of goods does not predominate; and

(3) any dispute arising under an agreement obligating the seller to install, customize, service, repair, or replace goods at or after the time of contracting.

(b) If this Article conflicts with Article 2A or 9, those Articles govern.

37. *Id.*

38. *Id.*

(c) A transaction subject to this Article is also subject to applicable consumer protection laws of this State, including contracts for the sale of farm products.³⁹

The redraft appears to codify a combination of the bifurcation test, which has been rejected by most courts,⁴⁰ and the predominant thrust test, recently adopted in Indiana.⁴¹ Subsection (1) appears to require application whenever there is a contract for the sale of goods. However, the question remains—at what point does a transaction become a sale of goods rather than a rendition of services? Thus, the predominant thrust test may still be necessary under the redraft approach. Subsection (2) is similar to the bifurcation approach in that the UCC could apply even in transactions where services predominate. The same problems as with the bifurcation approach might arise under this redraft subsection when disparate disputes arise from both the goods portion of the transaction and the services portion.⁴² For the same reasons that the Indiana Supreme Court recently rejected the bifurcation test,⁴³ the Commissioners on Uniform State Laws should reject the current redraft. Instead, several alternatives should be considered.

2. *Alternatives to the Current Redraft.*—Several alternatives have been suggested under which the application or non-application of Article 2 to contracts involving both sales of goods and rendition of services would become clear.

a. *Revise the scope of Article 2*

The first alternative would be to revise the scope of Article 2 to specifically include software contracts and other contracts in which the issue of application of Article 2 most often arises.⁴⁴ Adoption of this approach would require extensive redrafting of the existing Article 2 in order to make it compatible with

39. The American Law Institute and the National Conference of Commissioners on Uniform State Laws, Draft of Uniform Commercial Code Revised Article 2—Sales, Parts 1, 2, 3, and 7 December 21, 1993, at 7-8.

40. See *supra* Part I.B.1.

41. See *supra* Part I.B.2.

42. See *supra* Part I.B.1.

43. *Id.*

44. See Nimmer, Cohn & Kirsch, *supra* note 32, at 315-18. A definition of “software contract” was recommended by Professor Nimmer, Reporter on Technology Issues for the Drafting Committee to Revise UCC Article 2:

An agreement that transfers or promises to transfer one or more rights in specific computer software, including the right to access, the right to use or to have used, the right to modify, the right to copy or the right to otherwise employ the computer software. A transaction is a software contract whether the software is in existence at the time of the contract or is to be developed. A contract is a software contract regardless of whether or not the contract also contemplates transfer of tangible property containing the computer software or services to develop or support the software.

Id. at 294.

technologically advanced transactions.⁴⁵ For example, software delivered through remote access transmission would not be compatible with the current Article 2 provisions regarding delivery and acceptance.

Although this approach is better than the current redraft, merely revising the scope provisions of Article 2 appears to be only a temporary solution. Article 2 and its predecessors were drafted during the industrial age. Since then, we have entered what many call the information age, where technological advancements frequently occur in the area of intellectual property. The future is sure to provide us with new technological innovations that will raise similar issues with respect to the application of Article 2. If the Commissioners on Uniform State Laws choose simply to revise the current Article 2, they must be prepared to make revisions every few years in order to keep pace with technology.

b. The "hub and spoke" configuration

A second option would be to adopt a "hub and spoke" approach to Article 2. Under this approach, Article 2 would contain general principles which are applicable to all commercial contracts. Several sub-articles would then be developed, similar to Article 4A—Electronic Funds Transfers, in which more specific transactions, such as software contracts, could be addressed with particularity.⁴⁶

The hub and spoke approach to drafting the revision appears to be the most forward-thinking of the options available. As technology advances, this configuration would allow new types of transactions to be subject to the provisions of Article 2 without having to redraft and enact an entire Article. Instead, new sub-articles could be added as they become necessary. This approach would provide for faster adaptation of Article 2 to technological advances and would promote uniformity of laws because the states may be more likely to adopt new sub-parts without significantly altering the "hub" Article.

c. Exclude various transactions from Article 2

A final alternative would be to remove various types of contracts from the scope of Article 2. New articles of the UCC could then be created to deal specifically with transactions such as intangibles licensing.⁴⁷

45. For a detailed analysis of necessary changes, see Nimmer, Cohn & Kirsch, *supra* note 32, at 284-85.

46. See Nimmer, Cohn & Kirsch, *supra* note 32, at 318-22. Similar problems to those which arise in applying Article 2 to software sales also arise on text of electronic funds transfers and Article 4. These problems were addressed by the adoption of Article 4A—Electronic Funds Transfers. See National Automated Clearing House Association, Uniform Commercial Code Article 4A and the Automated Clearing House System 6-7, 1990; MICHAEL K. MCCRORY & JUDY L. WOODS, UNIFORM COMMERCIAL CODE UPDATE: SECTIONS 2A AND 4A (1991).

47. See Nimmer, Cohn & Kirsch, *supra* note 32, at 322-25.

Although this alternative is preferable to simply expanding the scope of Article 2 to include those transactions in which application questions often arise, merely excluding these transactions from the scope of Article 2 also has significant drawbacks. First, these transactions, such as software transactions, share several characteristics with other types of commercial transactions. The commercial public would be best served by simplification of the laws applicable to commercial transactions. This simplification would occur by placement of the core rules in one location, rather than creating a separate set of rules to apply to what may seem to the public to be very similar transactions. Also, a well-developed body of case law exists interpreting the provisions of Article 2. These cases could be a valuable resource to use in applying the basic principles of Article 2 to software transactions. If software and similar transactions are removed from the scope of Article 2 and a new Article is adopted to deal specifically with licensing transactions, the precedential value of these cases would be diminished.

E. Conclusion

The recent adoption by the Indiana Supreme Court of the predominant thrust approach to determine whether Article 2 of the Uniform Commercial Code applies to transactions involving both a sale of goods and rendition of services was an appropriate step to keep Indiana law consistent with the majority of the states. Adoption of the predominant thrust test, however, does not resolve whether various types of computer software transactions are subject to the provisions of Article 2. In the coming years, when the American Law Institute and the National Conference of Commissioners on Uniform State Laws complete a redraft of Article 2 for consideration by the states, they should propose a configuration of Article 2 using a hub and spoke format that anticipates and is adaptable to future technological advances.

II. CONTRACT ACTIONS—AWARD OF PUNITIVE DAMAGES

The Indiana Supreme Court, in a three-justice majority opinion authored by Justice Krahulik, recently clarified the previously stated “general rule” that punitive damages are not allowed in breach of contract actions and held that “there are no exceptions” to this rule.⁴⁸ Thus, punitive damages are not recoverable for “tort-like” conduct. Instead, “in order to recover punitive damages in a lawsuit founded upon a breach of contract, the plaintiff must plead and prove the existence of an independent tort of the kind for which Indiana law recognizes that punitive damages may be awarded.”⁴⁹

48. *Miller Brewing Co. v. Best Beers of Bloomington, Inc.*, 608 N.E.2d 975, 981 (Ind. 1993).

49. *Id.* at 984.

A. *Factual Background*

In *Miller Brewing Co. v. Best Beers of Bloomington, Inc.*,⁵⁰ Best Beers brought suit against Miller for wrongful termination of its distributorship agreement, seeking both compensatory and punitive damages.⁵¹ Evidence presented at trial established that Miller wrongfully terminated the contract, but such evidence was insufficient to prove an independent tort.⁵² The trial court entered judgment for Best Beers in the amount of \$397,852 for compensatory damages and \$1,989,260 for punitive damages. The Court of Appeals affirmed the trial court's award of compensatory damages and the entitlement of Best Beers to punitive damages, but remanded for a redetermination of the amount.⁵³ On transfer to the Indiana Supreme Court, Best Beers asserted that the evidence at trial only demonstrated a "serious wrong tortious in nature."⁵⁴ Because the evidence at trial was sufficient to support a finding of tortious-like conduct but not an independent tort, the key issue for the Supreme Court was whether a plaintiff must prove the elements constituting an independent tort in order to be entitled to a punitive damage award.

B. *The Vernon Fire & Casualty Case*

The general rule that punitive damages are not allowed in breach of contract actions has been frequently repeated in Indiana.⁵⁵ Labelling such a rule a general rule suggests that exceptions to the rule do exist, as exemplified by the opinion in *Vernon Fire & Casualty Ins. Co. v. Sharp*.⁵⁶ In *Vernon Fire & Casualty*, the plaintiff sued his insurer for breach of his insurance contract. Because the insurer refused to pay the proceeds which were admittedly due—an action which closely resembles fraud due to the nature of the relationship between the insurer and the insured—the plaintiff sought and obtained punitive damages as well.⁵⁷

On appeal, the Indiana Supreme Court concluded that punitive damages are inappropriate in breach of contract cases because "the well defined parameters of compensatory and consequential damages which may be assessed against a promisor who decides for whatever reason not to live up to his bargain lend a needed measure of stability and predictability to the free enterprise system."⁵⁸

50. 608 N.E.2d 975 (Ind. 1993).

51. *Id.* at 978.

52. *Id.* at 984.

53. *Miller Brewing Co. v. Best Beers of Bloomington, Inc.*, 579 N.E.2d 626 (Ind. Ct. App. 1991).

54. *Miller Brewing Co.*, 608 N.E.2d at 984.

55. *Id.* at 981. See, e.g., *Lawyers Title Ins. Corp. v. Pokraka*, 595 N.E.2d 244, 250 (Ind. 1992); *Bud Wolf Chevrolet, Inc. v. Robertson*, 519 N.E.2d 135, 136 (Ind. 1988).

56. 349 N.E.2d 173, 180 (Ind. 1976).

57. *Id.* at 185.

58. *Id.* at 180.

However, because the plaintiff also proved the elements of common law fraud, punitive damages were awarded for that independent tort.

Confusion as to the requirements for the award of punitive damages arises from a statement in the *Vernon Fire & Casualty* opinion.⁵⁹ The majority in that case stated that "when it appears from the evidence as a whole that a serious wrong, tortious in nature, has been committed, but the wrong does not conveniently fit the confines of a pre-determined tort,"⁶⁰ the requirement that the elements of an independent tort be proved seems unnecessary, especially when "the public interest will be served by the deterrent effect punitive damages will have upon future conduct of the wrongdoer and parties similarly situated."⁶¹

C. *The Majority Opinion in Best Beers*

The majority in *Best Beers* determined that the *Vernon Fire & Casualty* Court's suggestion that an independent tort was unnecessary in order to recover punitive damages in contract actions was merely dicta.⁶² The factors that led to this conclusion included, first, the majority's view that the Court had never applied the dicta in *Vernon Fire & Casualty* to a case and, secondly, public policy arguments.⁶³

The public policies cited by the Court in the decision include the legal legacy that "there is no right to punitive damages, which are in the nature of a criminal penalty."⁶⁴ "Once a plaintiff has been awarded compensatory damages, then he has been awarded all that he is entitled to receive as a matter of law."⁶⁵

Further, the common law has long recognized a party's right to breach a contract and pay compensatory damages.⁶⁶ Judge Posner recently explained this

59. See also *Lawyers Title Ins. Corp. v. Pokraka*, 595 N.E.2d 244, 250 (Ind. 1992); *Bud Wolf Chevrolet, Inc. v. Robertson*, 519 N.E.2d 135, 136 (Ind. 1988); *Travelers Indem. Co. v. Armstrong*, 442 N.E.2d 349, 362 (Ind. 1982); *Art Hill Ford, Inc. v. Callender*, 423 N.E.2d 601, 602 (Ind. 1981); *F.D. Borkholder Co., Inc. v. Sandock*, 413 N.E.2d 567, 570 (Ind. 1980); *Hibschman Pontiac, Inc. v. Batchelor*, 362 N.E.2d 845, 847 (Ind. 1977). In each of these cases the Court states the "general rule," thus suggesting that exceptions to the rule are recognized.

60. 349 N.E.2d at 180.

61. *Id.*

62. 608 N.E.2d 975, 983 (Ind. 1993).

63. *Id.* at 983-84. See also *Orkin Exterminating Co., Inc. v. Traina*, 486 N.E.2d 1019, 1021 (Ind. 1986); *Travelers Indem. Co. v. Armstrong*, 442 N.E.2d 244, 250 (Ind. 1982); *Carroll v. Statesman Ins. Co.*, 493 N.E.2d 1289, 1292 (Ind. Ct. App. 1986).

64. *Id.* at 983 (citing *Travelers Indem. Co. v. Armstrong*, 442 N.E.2d 349, 363 (Ind. 1982)).

65. *Id.* at 983 (citing *Orkin Exterminating Co., Inc. v. Traina*, 486 N.E.2d 1019, 1022 (Ind. 1986)).

66. *Id.* at 984.

policy principle in *Patton v. Mid-Continent Systems, Inc.*,⁶⁷ wherein he stated that

Indiana allows punitive damages to be awarded in suits for breach of contract if, "mingled" with the breach, are "elements of fraud, malice, gross negligence or oppression."⁶⁸ In trying to give concrete meaning to these terms (especially "oppression"), it is important to bear in mind certain fundamentals of contractual liability. . . . Even if the breach is deliberate, it is not necessarily blameworthy. The promisor may simply have discovered that his performance is worth more to someone else. If so, efficiency is promoted by allowing him to break his promise, provided he makes good the promisee's actual losses. If he is forced to pay more than that, an efficient breach may be deterred, and the law doesn't want to bring about such a result.⁶⁹

Considering these policy reasons, the *Best Beers* Court held "that in order to recover punitive damages in a lawsuit founded upon a breach of contract, the plaintiff must plead and prove the existence of an independent tort of the kind for which Indiana law recognizes that punitive damages may be awarded."⁷⁰

D. *The Minority Opinion in Best Beers*

Justice Dickson, in a dissent to which Justice Givan concurred, argued that the general rule that punitive damages are not available in contract actions has two exceptions. The first exception is consistent with the majority opinion, requiring proof of the elements of an independent tort. The second exception, consistent with the dicta in *Vernon Fire & Casualty*, arises when "the evidence reveals that a serious wrong, tortious in nature, has been committed, although the wrong 'does not conveniently fit the confines of a pre-determined tort.'"⁷¹ Justice Dickson disagreed with the majority's public policy reasoning as well as their view that the second exception had never been used by the Court. In support of his argument that the second exception had been utilized by the Court, Justice Dickson cited *Liberty Mutual Insurance Co. v. Parkinson*.⁷² In *Parkinson*, the Indiana Supreme Court affirmed an award of punitive damages against an insurance company that demonstrated bad faith when it failed to settle

67. 841 F.2d 742 (7th Cir. 1988). See also RICHARD A. POSNER, *ECONOMIC ANALYSIS OF LAW* § 4.8 (1986).

68. *Id.* at 750 (quoting *Travelers Indem. Co. v. Armstrong*, 442 N.E.2d 349, 359 (Ind. 1982)(citations omitted)).

69. *Id.*

70. 608 N.E.2d at 984.

71. *Id.* at 985 (quoting *Vernon Fire & Ins. Co. v. Sharp*, 349 N.E.2d 173, 180 (Ind. 1976)).

72. *Id.* at 986 (citing *Liberty Mut. Ins. Co. v. Parkinson*, 487 N.E.2d 162 (Ind. 1985)).

Interestingly, the majority did not mention this case in its analysis.

an uninsured motorist claim.⁷³ The Court in *Liberty Mutual* concluded that it previously found “no reason to adopt bad faith as an independent tort in this state and we see no need to adopt such action now.”⁷⁴ Thus, it affirmed the punitive damages award without proof of an independent tort.

With regard to the public policy concerns, Justice Dickson recognized the benefits of a “bright-line” rule such as the one adopted by the majority. However, because “reprehensible behavior often defies strict tort categorization . . . [it] should not go undeterred merely because it fails to completely conform to the precise contours of pre-existing tort classifications.”⁷⁵

E. Conclusion

Through its opinion in *Best Beers*, the Indiana Supreme Court adopted a straightforward approach to the issue of whether punitive damages are recoverable in breach of contract cases. A steadfast rule requiring pleading and proof of an independent tort before punitive damages may be awarded in contract actions provides stability to contractual relationships and certainty to difficult decisions to exercise the common law right to breach contracts.

III. SECURED TRANSACTIONS—PAYMENTS IN THE “ORDINARY COURSE” OF BUSINESS

In *J.I. Case Credit Corp. v. First National Bank of Madison County*,⁷⁶ the United States Court of Appeals for the Seventh Circuit created a working definition for “ordinary course” of business, thus clarifying the circumstances under which the proceeds from the sale of collateral may be recovered by the secured party.⁷⁷ The court held that “a payment is within the ordinary course if it was made in the operation of the debtor’s business and if the payee did not know and was not reckless about whether the payment violated a third party’s security interest.”⁷⁸

73. *Id.*

74. *Id.* at 165. Regardless of whether punitive damages are available upon a showing of bad faith in insurer/insured relationships, such relationships are clearly distinguishable from commercial relationships. See *Erie Ins. Co. v. Hickman*, 622 N.E.2d 515, 518 (Ind. 1993).

75. *Miller Brewing Co. v. Best Beers of Bloomington, Inc.*, 608 N.E.2d 975, 987 (Ind. 1993). With regard to Justice Dickson’s characterization of some breaching behavior as “reprehensible,” see POSNER, *supra* note 67 § 4.8; *Patton v. Mid-Continent Systems, Inc.*, 841 F.2d 742, 750-51 (7th Cir. 1988).

76. 991 F.2d 1272 (7th Cir. 1993).

77. This same approach was also recently adopted by the Fourth Circuit in *Orix Credit Alliance, Inc. v. Sovran Bank, N.A.*, 4 F.3d 1262 (4th Cir. 1993).

78. 991 F.2d at 1279.

A. *Factual Background*

The dispute in *J.I. Case Credit Corp.* arose when James Humphrey, the sole shareholder of a farm equipment sales business, applied the proceeds from the sale of farm equipment subject to a perfected purchase money security interest in favor of J.I. Case Credit to debts the company owed to the First National Bank of Madison County.⁷⁹ The Bank was aware the purchase money security interest covered both the equipment and the proceeds from its sale and required Humphrey to immediately pay ninety percent of the proceeds from Case farm equipment sales to Case. The security agreement also provided that all proceeds should be placed in an express trust for Case.⁸⁰

Instead of creating such a trust, Humphrey simply deposited all proceeds from the Case farm equipment sales, as well as all other types of sales, into his business checking account from which he made all his business disbursements.⁸¹ As the financial health of Humphrey's company declined, Humphrey made several large payments to the Bank to extinguish debts. Although these payments were admittedly unusually large compared to Humphrey's past payment record, the Bank was not aware that such payments were made with proceeds from the sale of the secured Case equipment.⁸² After making several of these payments, Humphrey went out of business.⁸³

Shortly thereafter, Case learned of the use of the proceeds from the sale of the secured Case equipment to pay other creditors, including the Bank. Case subsequently brought suit against the Bank upon several theories, including unjust enrichment and common law conversion.⁸⁴ At trial, the Bank asserted the defense that Humphrey made the payments to the Bank in the ordinary course of business and thus, according to Indiana Code section 26-1-9-306, Comment 2(c), the Bank was not liable to Case. District Court Judge Barker rejected this defense, finding that because the Bank did know of the security interest in the proceeds from the sale of Case equipment, this "should have put a reasonable bank, exercising prudent business practices, on notice that something was awry."⁸⁵ Thus, the district court awarded judgment in favor of Case in the amount of \$188,000.⁸⁶

79. *Id.* at 1273.

80. *Id.*

81. *Id.* at 1273-74.

82. *Id.* at 1274.

83. *Id.*

84. *Id.*

85. *Id.*

86. *Id.*

B. Comment 2(c) to Indiana Code section 26-1-9-306

The Indiana Code provides that a “security interest continues . . . in any identifiable proceeds”⁸⁷ It is a well-established rule that a secured party may bring an action for conversion to recover proceeds wrongfully paid to a third party.⁸⁸ However, Comment 2(c) to Indiana Code section 26-1-9-306 provides that:

[w]here cash proceeds are covered into the debtor’s checking account and paid out in the operation of the debtor’s business, recipients of the funds of course take free of any claim which the secured party may have in them as proceeds. What has been said relates to payments and transfers in the ordinary course. The law of fraudulent conveyances would no doubt in appropriate cases support recovery of proceeds by a secured party from a transferee out of ordinary course or otherwise in collusion with the debtor to defraud the secured party.⁸⁹

Thus, the question arises: What does “ordinary course” mean?

C. The Meaning of “Ordinary Course”

Although the Code does not define ordinary course as it is used in this context, the Court of Appeals concluded that the Comment gives some guidance as to the meaning. “At the very least, to be made in ordinary course, payments must be made ‘in the operation of the debtor’s business.’”⁹⁰ An important factor considered by the court in its determination of the meaning of ordinary course is commercial policy. As the First Circuit recently indicated, “good commercial reasons” justify giving the term ordinary course a broad interpretation.⁹¹ “If . . . courts too readily impose liability upon those who receive funds from the debtor’s ordinary bank account . . . then ordinary suppliers of gas, electricity, tables, chairs, etc., might find themselves called upon to return ordinary payments . . . to a debtor’s secured creditor.”⁹² The Seventh Circuit found this reasoning persuasive, stating that “[i]mposing liability too readily on payees from commingled accounts could impede the free flow of goods and services essential to business . . . as suppliers take steps to ensure that they will ultimately not have to return the money they receive.”⁹³

87. IND. CODE § 26-1-9-306(2) (1988).

88. 991 F.2d at 1275. *See also* Citizens Nat’l Bank of Whitley County v. Mid-States Development Co., 380 N.E.2d 1243, 1244 (Ind. Ct. App. 1978).

89. 991 F.2d at 1276 (quoting Comment 2(c) of IND. CODE § 26-1-9-306 (1988)).

90. 991 F.2d at 1276.

91. *Id.* at 1277 (quoting Harley-Davidson Motor Co. v. Bank of New England, 897 F.2d 611, 622 (1st Cir. 1990)).

92. *Id.*

93. *Id.*

Furthermore, the court noted that “[t]he Code and comment justify a fairly broad definition of ‘ordinary course.’ Comment 2(c)’s language suggests that when determining whether a payment is made in ordinary course, the most important factor to consider is the payee’s knowledge about whether the payment was made with money that rightfully belongs to another.”⁹⁴ Thus, the court, taking the Comment at face value, concluded that “where a debtor pays commingled funds in the operation of its business to a third party, the third party takes those funds in ‘ordinary course’ unless it knows the payment violates a superior secured interest in those funds.”⁹⁵

The court then looked to Indiana Code section 26-1-1-201(9) which defines a similar term. There, the Code defines “buyer in the ordinary course of business” as requiring both “good faith” and lack of “knowledge.” Thus, the court determined the reasonable conclusion to draw is that “the drafters intended for the same factors [specifically stated in section 1-201(9)]—good faith and lack of knowledge—to qualify a payment or transfer as one in the ordinary course.”⁹⁶ Because the Code defines “knowledge” as “actual knowledge,”⁹⁷ constructive knowledge will not suffice. However, the court noted that there are situations in which a person without actual knowledge can participate in a transaction that is out of the ordinary course. “A person may have information causing him to suspect strongly that a payment violates a secured party’s interest, yet take deliberate steps to avoid discovering more for fear of what he may learn.”⁹⁸ Such intentional avoidance of discovery is the equivalent of recklessness, generally equated with actual knowledge. Thus, the court established the rule to be applied: “[A] payment is within the ordinary course if it was made in the operation of the debtor’s business and if the payee did not know and was not reckless about whether the payment violated a third party’s security interest.”⁹⁹

D. Application of the Newly Established Rule to the Facts

The District Court found that because the Bank knew of the existence of a security interest and because the payments made by Humphrey were unusually large, the Bank had sufficient information to “put a reasonable bank, exercising prudent business practices, on notice that something was awry.”¹⁰⁰ However, the conduct noted by the District Court, essentially the equivalent of negligence, does not rise to the level of recklessness. Additionally, “[t]he Bank may have known about Case’s security interest, but as we have seen that does not

94. *Id.*

95. *Id.*

96. *Id.* at 1277-78 (quoting *Anderson, Clayton & Co. v. First Am. Bank*, 614 P.2d 1091, 1094 (Okla. 1980)).

97. IND. CODE § 26-1-1-201(25) (1988).

98. 991 F.2d at 1278.

99. *Id.* at 1279.

100. *Id.* at 1274.

necessarily mean the Bank knew Humphrey's payments violated that interest."¹⁰¹ Thus, the Court of Appeals concluded that "since Humphrey made his payments in the operation of his business, those payments were made in the ordinary course of business and Case is not entitled to recover them."¹⁰²

E. Conclusion

Consistent with other jurisdictions, the Seventh Circuit has established an uncomplicated working definition of payments in the ordinary course of business as payments made in the operation of business without knowledge or recklessness on the part of the payee about whether the payment violates another's security interest. This explanation provides straightforward guidance as to the circumstances under which the proceeds from the sale of collateral may be recovered by the secured party.

IV. CONTRACTS—"COMPETITIVE" OFFERS

In *PSI Energy, Inc. v. Exxon Coal USA, Inc.*,¹⁰³ the United States Court of Appeals for the Seventh Circuit considered the requirements for a bid to be deemed "competitive" when the term "competitive" is not defined in a contract providing for price renegotiation based upon such a bid. The court held that "[a]n offer may be 'competitive' although the non-price terms differ in some material respects from the terms of the [contract under renegotiation], but that one indispensable element of a 'competitive offer' is a price that can be matched by a single Base."¹⁰⁴

A. Factual Background

PSI Energy entered into a long-term contract with Exxon Coal for the supply of high-sulfur coal. Due to increasingly stringent environmental regulations since the inception of the contract, high sulfur coal became less cost effective for PSI Energy's use.¹⁰⁵ As a result, PSI Energy sought to either terminate the contract with Exxon Coal or reduce the price of the high-sulfur coal in order to offset the cost of removing the sulfur.¹⁰⁶

The contract between PSI Energy and Exxon Coal provided a mechanism to adjust the price of the coal over the life of the contract. The starting point for the price calculation was the "Base." This amount was defined as the price F.O.B. PSI's power plant.¹⁰⁷ The Base was subject to adjustment based upon

101. *Id.* at 1279.

102. *Id.* at 1280.

103. 991 F.2d 1265 (7th Cir. 1993), *on remand*, 831 F. Supp. 1430 (S.D. Ind. 1993).

104. *Id.* at 1271.

105. *Id.* at 1266.

106. *Id.*

107. *Id.*

a number of factors, including those specified in Exhibit "A" of the contract and the amount of sulfur in the coal beyond a specified limit.¹⁰⁸ Further, the contract provided that the Base and adjustments could be renegotiated at five-year intervals. As part of this renegotiation process, PSI was permitted to solicit other bids.¹⁰⁹ Exxon was free to either match the competing bid or terminate the relationship. The relevant portion of the contract was as follows:

If the parties are unable to reach agreement [as to renegotiation of the Base], BUYER will accept SELLER'S last offer or present SELLER with a firm, written offer which it has received from another supplier, which it is willing to accept, for the supply of coal . . . SELLER shall have the right to meet such competitive offer.¹¹⁰

The contract went on to provide:

It is understood and agreed that the purpose and intent of [the renegotiation provisions], are only to provide for renegotiation of Base and Exhibit "A," and neither party shall inject into such negotiations, as a condition of agreement upon a new Price for the coal, any demand or request that other terms and conditions of this Agreement be altered.¹¹¹

Thus, the contract allowed Exxon Coal to respond to the competitive bids by reducing its Base and Exhibit "A" adjustments without altering the remaining terms of the agreement. This scheme allowed the parties to look to the Base alone to determine whether a competing bid was more or less favorable. The varying quality of the coal was accounted for in the portion of the price calculation not subject to renegotiation.

In accordance with this adjustment mechanism, PSI solicited competitive bids. PSI received several bids it deemed more favorable than the Exxon Coal contract terms. PSI then submitted the most favorable bid to Exxon in accordance with the contract.¹¹² The competitive bid differed significantly from the Exxon bid in both price and structure in that the competing bid offered to supply coal from three different mines at three different "starting prices."¹¹³ Exxon objected to the submitted bid claiming it was not a competitive offer as contemplated by the contract. Exxon did propose, however, to match the offer by calculating a "weighted price" in the event the submitted bid was deemed to be a competitive offer.¹¹⁴

108. *Id.*

109. *Id.* at 1267.

110. *Id.*

111. *Id.* at 1268.

112. *Id.*

113. *Id.*

114. *Id.* at 1269.

In response, PSI brought suit seeking a declaratory judgment that Exxon failed to match the submitted competitive offer. Exxon filed a counterclaim for a declaratory judgment that the submitted offer was not a competitive offer, but if it was, Exxon's weighted price offer met the terms of the competitive offer.¹¹⁵ The District Court, finding that the submitted offer was a competitive offer, issued a declaratory judgment that Exxon failed to meet the competitive offer. In making this finding, the District Court held that Exxon could meet the competitive offer by adjusting its Base without matching all of the submitted non-price terms. However, the court also found that the competing non-price concessions must be offset "with corresponding reductions on the Base."¹¹⁶

B. The Court's Decision

In deciding this case, the Seventh Circuit noted that "when the language of the contract runs out, we must try to understand the function of the language and complete the agreement in light of the parties' mutual objectives."¹¹⁷ Because the contract did not specify the required contents of a competitive offer, the District Court was left to make this determination.

In its analysis, the court indicated that

Exxon's ability to limit the competition to price, and price alone, for the kind of coal Exxon has to offer, is what makes this a genuinely long-term contract This cannot be achieved if Exxon must match the value of a rival's non-price terms by reducing its Base. Moreover, the entire conception of the renegotiation and competitive bid process as a way to mark Base to market would fail if non-price aspects of rival bids had to be evaluated and reflected in the Base.¹¹⁸

Thus, policy concerns dictate that "[a]n offer may be 'competitive' although the non-price terms differ in some material respects from the terms of the [contract being renegotiated], but that one indispensable element of a 'competitive offer' is a price that can be matched by a single Base."¹¹⁹

Applying this rule to the instant case, the competitive offer submitted by PSI did not meet the requirements for an offer to be considered competitive. Thus, Exxon Coal was under no obligation to meet the terms of the submitted offer.¹²⁰

115. *Id.*

116. *Id.* at 1270.

117. *Id.*

118. *Id.* at 1270-71.

119. *Id.* at 1271.

120. *Id.*

C. Conclusion

In *PSI Energy, Inc. v. Exxon Coal USA, Inc.*, the United States Court of Appeals for the Seventh Circuit made clear its view that identical price terms are essential to a competitive offer. “An offer may be ‘competitive’ although the non-price terms differ in some material respects from the terms of the [contract under renegotiation], but that one indispensable element of a ‘competitive offer’ is a price that can be matched by a single Base.”¹²¹ Although it indicated that non-price terms may differ from the terms of the contract under renegotiation, the court did sound a warning that a “rival bid inferior [to the contract under renegotiation] in any material respect runs a substantial risk of being deemed not a ‘competitive offer.’”¹²²

121. *Id.*

122. *Id.* at 1272.

THE LAW OF NEGOTIABLE INSTRUMENTS AND BANK COLLECTIONS UNDERGOES MAJOR CHANGES: INDIANA REPLACES ARTICLE 3 AND UPDATES ARTICLE 4 OF THE UNIFORM COMMERCIAL CODE

HAROLD GREENBERG*

INTRODUCTION

Once again, the Legislature has moved to keep Indiana commercial law in step with modern business and banking practice, this time by following the recommendations of the sponsors of the Uniform Commercial Code and replacing Uniform Commercial Code Article 3—Commercial Paper with a completely Revised Article 3—Negotiable Instruments, and by making major changes in Article 4—Bank Deposits and Collections, plus appropriate conforming changes in the definitions sections of Article 1 and in other parts of the Code, all of which becomes effective on July 1, 1994.¹ The Revised Article 3, designated Chapter 3.1 of Indiana's U.C.C., completely replaces its predecessor Chapter 3,² which was enacted in 1963.³ Chapter 3 of Indiana's U.C.C. was itself a revision of the Uniform Negotiable Instruments Law which had been the law of Indiana since 1913.⁴ The changes in Article 4 (Indiana's Chapter 4

* Professor of Law, Indiana University School of Law—Indianapolis. A.B., 1959, Temple University; J.D., 1962, University of Pennsylvania.

1. See Pub. L. No. 222-1993, § 58, 1993 Ind. Legis. Serv. 2416 (West) ("IC 26-1-3 is repealed [effective July 1, 1994]"), and the headings to the various sections of Pub. L. No. 222-1993, § 58, 1993 Ind. Legis. Serv. 2416 (West).

2. See Pub. L. No. 222-1993 § 5, 1993 Ind. Legis. Serv. 2364 (West) ("IC 26-1-3.1 is added to the Indiana Code as a *new* chapter to read as follows [effective July 1, 1994]").

3. 1963 Ind. Acts ch. 317. The U.C.C. appears at IND. CODE §§ 26-1-1-101 to -10-106 (1988 & Supp. 1992). Hereafter, reference to pre-1992 sections of the U.C.C. will be to generic section numbers rather than to the Indiana Code numbers, e.g., § 3-101 rather than § 26-1-3-101, unless the Indiana version differs from the Official 1987 draft. Reference to sections of Revised Article 3, to changes in Article 4, and to any corresponding changes in other articles, will contain the letter "R," e.g., § 3R-101 and § 4R-101. Both articles may be referred to herein simply as the "Revisions."

4. See HARRY R. PRATTER & R. BRUCE TOWNSEND, INDIANA UNIFORM COMMERCIAL CODE WITH COMMENTS 98 (1963). The Uniform Negotiable Instruments Law (N.I.L.) had been promulgated by the National Conference of Commissioners on Uniform State Laws in 1896 and was based on the English Bill of Exchange Act of 1882. See U.C.C. Rev. Art. 3 prefatory note, 2 U.L.A. 7 (1991) [hereinafter "Art. 3R prefatory note"]; Robert L. Jordan & William D. Warren, *Introduction to Symposium: Revised U.C.C. Articles 3 & 4 and New Article 4A*, 42 ALA. L. REV. 373, 385 (1991). One author has characterized the N.I.L. as "a rather slavish copy" of the English Act and that Act as "an unimaginative codification of preexisting common law," which developed over the preceding two centuries. Robert G. Ballen et al., *Commercial Paper, Bank Deposits and Collections, and Other Payment Systems*, 44 BUS. LAW. 1515, 1539 (1989) (The portion of this Survey dealing with the revisions of Articles 3 and 4 was written by Edward L. Rubin. *Id.* at 1515.) [hereinafter 1989 U.C.C.

of the U.C.C.), are also quite extensive. The changes are intertwined with the changes to Article 3 and affect the bank collection process, which deals mainly with the processing and payment of checks. With this enactment, Indiana has joined at least thirty other states in adopting the new provisions.⁵

These Revisions by the National Conference of Commissioners on Uniform State Laws and the American Law Institute, the original sponsors of the U.C.C., were a companion to the creation of new Article 4A on electronic funds transfers,⁶ which was added to Indiana's U.C.C. in 1991.⁷ As noted by the drafters, the original Articles 3 and 4 were written for a relatively slow, paper-based payment system that did not anticipate new electronic technologies or the explosion in check processing volume.⁸ Moreover, as with any statute of the Code's complexity, problems of application and interpretation of Articles 3 and 4 surfaced over the years and called for clarification or revision.

A comprehensive analysis of all of the changes to Articles 3 and 4 would require a work far longer and more detailed than this survey article.⁹ Rather,

Survey].

5. See Fred H. Miller, *Et Sic Ulterius*, UCC BULLETIN 2 (Sept. 1993); A.B.A. Sec. on Bus. Law, UCC Committee Update, *UCC Scorecard: 50 State Survey of Adoptions of Revised Official Text of the UCC* 14 (June, 1993). Prof. Miller reports adoption in Alaska, Arizona, Arkansas, California, Connecticut, Florida, Hawaii, Idaho, Illinois, Indiana, Kansas, Louisiana, Maine, Michigan, Minnesota, Mississippi, Missouri, Montana, Nebraska, Nevada, New Hampshire, New Mexico, North Dakota, Oklahoma, Pennsylvania, Utah, Virginia, Washington, West Virginia, and Wyoming.

6. Art. 3R prefatory note, *supra* note 4.

7. IND. CODE § 26-1-4.1 (Supp. 1992). See Harold Greenberg, *Indiana Adds Articles 2A and 4A of Uniform Commercial Code*, 25 IND. L. REV. 1029 (1992).

8. Art. 3R prefatory note, *supra* note 4. Professors Jordan and Warren have observed: Some of the official comments [to the original Code] suggest that the drafters envisioned a bookkeeper with a green eyeshade and black sleevelets carefully examining each check before marking it "paid" and placing it in the customer's file. This antiquated notion is entirely impractical today. Approximately 56 billion checks were drawn in the United States in 1990.

Jordan & Warren, *supra* note 4, at 392 (footnotes omitted).

9. See, e.g., JAMES J. WHITE & ROBERT S. SUMMERS, UNIFORM COMMERCIAL CODE (3d ed. 1993 Pocket Part) [hereinafter WHITE & SUMMERS]; Henry J. Bailey, *New 1990 Uniform Commercial Code: Article 3, Negotiable Instruments, and Article 4, Bank Deposits and Collections*, 29 WILLAMETTE L. REV. 409 (1993); Arthur G. Murphey, Jr., *Revised Article 3 and Amended Article 4 of the Uniform Commercial Code: Comments on the Changes They Will Make*, 46 ARK. L. REV. 501 (1993). Part One of the White & Summers 1993 pocket part to their 1988 text contains 127 pages of discussion of the Revisions. Prof. Bailey's article is a 156-page, section by section analysis of the Revisions, in which the author recommends against their further enactment until his recommended changes are made. See *id.* at 410. Prof. Murphey's article covers 103 pages. The Revisions have also generated numerous articles and symposia analyzing the drafting process and individual provisions. See, e.g., Symposium, *Is the UCC Dead, or Alive and Well?*, 26 LOY. L.A. L. REV. 535 (1993) (including more than Articles 3 and 4); Symposium, *Revised U.C.C. Articles 3 & 4 and New Article 4A*, 42 ALA. L. REV. 351 (1991); Mark E. Budnitz, *The Consequences of Bulk in Our Banking Diet: Bulk Filing of Checks and the Bank's Duty of Ordinary Care Under the 1990 Revision to the Uniform Commercial Code When It Honors Forged Checks*, 63 TEMP. L. REV. 729 (1990); Patricia L. Heatherman, Note, *Good Faith in Revised Article 3 of the Uniform Commercial*

this article will attempt to highlight the more significant changes brought about by these enactments, with a particular emphasis on Indiana law. This article is written on the assumption that the reader has at least a basic understanding of the law applicable to negotiable instruments and the bank collection process found in Articles 3 and 4.

I. PRELIMINARY OBSERVATIONS

A. *The Official Comments*

As with the other articles and earlier versions of the Code, the drafters have performed an invaluable service by including Official Comments to each of the sections in the Revisions. In many instances, these comments are extensive and contain numerous hypothetical examples of precisely how the drafters intended the particular sections to work.¹⁰ Although the Official Comments are not part of the Code text and were not before the Legislature when the Revisions were enacted, they are the best available scholarly explanation of the meaning and operation of the Revisions and are the nearest thing to specific drafting history short of actual legislative reports.¹¹

B. *Application of the Old and New Provisions*

Lawyers, law students, judges and scholars have all long struggled with Articles 3 and 4 and with the concepts they embody. With the enactment of the Revisions, the situation becomes doubly complex because both the old and new versions may be applicable to the same transaction or instrument. For example, the substantive characteristics of promissory notes created prior to the effective date of the Revisions presumably will still be governed by the original Article

Code: Any Change? Should There Be? 29 WILLAMETTE L. REV. 567 (1993).

For general treatment of the revisions and the revision process, see, e.g., Robert G. Ballen et al., *Survey: Commercial Paper, Bank Deposits and Collections, and Other Payment Systems*, 46 BUS. LAW. 1521, 1539-56 (1991) [hereinafter "1991 U.C.C. Survey"]; 1989 U.C.C. Survey, *supra* note 4; Fred H. Miller, *Report on the New Payments Code*, 41 BUS. LAW. 1007 (1986); Edward L. Rubin, *Policies and Issues in the Proposed Revision of Articles 3 and 4 of the UCC*, 43 BUS. LAW. 621 (1988); Symposium, *Revised U.C.C. Articles 3 & 4 and New Article 4A*, 42 ALA. L. REV. 351 (1991).

10. See, e.g., § 3R-302, cmts. 4, 6 (6 illustrative cases); § 3R-312, cmt. 4 (6 illustrative cases); § 3R-404, cmt. 2 (5 illustrative cases); § 3R-405, cmt. 3 (7 illustrative cases).

11. This is clearly in keeping with the original intention of the first chief reporter of the U.C.C., Karl Llewellyn, who, in the earliest stages of Code drafting, was unwilling to await the publication of later scholarly explanations of, treatises about, the statute. Instead, he insisted on the concurrent drafting of comments to clarify and explain the provisions of the new law. See Letter from Karl Llewellyn to Dr. William Draper Lewis, Director of the American Law Institute (Feb. 27, 1942)(in the Archives of the A.L.I., Phila., PA). See also JOHN HONNOLD, *CASES AND MATERIALS ON THE LAW OF SALES AND SALES FINANCING* 12-13 (4th ed. 1976); Harold Greenberg, *Specific Performance under Section 2-716 of the Uniform Commercial Code: "A More Liberal Attitude" in the "Grand Style,"* 17 NEW ENG. L. REV. 321, 327 (1982).

3. Notes created after that date will be governed by the Revision. The transfer of pre-Revision notes, however, would seem to be governed by the law in effect on the date of any transfer, which could take place either before, or after, the effective date or even both if there is more than one transfer. Because promissory notes, particularly those given in real estate transactions, often remain outstanding for many years, it will be necessary to be familiar with both versions of Article 3.

Checks, on the other hand, are demand instruments,¹² and usually do not remain outstanding for long periods of time. Nevertheless, both versions of Articles 3 and 4 may be involved, for example, if there is a series of forgeries by one wrongdoer that straddles the effective date, or if a check is issued and certified prior to the effective date but is presented and dishonored thereafter. Post-dated checks or non-check drafts, *i.e.*, drafts on which the drawee is not a bank, may be issued prior to the effective date of the Revisions but payable after that date, thereby also involving the applicability of both versions of Articles 3 and 4.

C. Format

One change that relates more to style than to substance is the shift away from the "laundry list" approach of Article 3 to a more narrative, paragraphed style in the Revision. The explanation for this change is "to bring it more into the drafting style of the other articles of the UCC."¹³ This author questions whether the relatively easier use of a laundry list or checklist in applying a highly complex and technical statute should have been sacrificed for consistency of style.

The drafters have tried to retain many of the old and familiar section numbers. For example, the holder in due course of § 3-302 is dealt with in § 3R-302. However, the subdivision, deletion, and substantial revision of some sections has precluded perfect parallel numbering.

II. SIGNIFICANT CHANGES

The Revisions have made changes of particular significance in four areas: The personal liability of an agent who signs on behalf of a principal; the liability and discharge of accommodation parties or sureties; the replacement of a strict, contributory negligence scheme with comparative negligence; and the facilitation of "check truncation" in the collection process.¹⁴ The rules in several other

12. See U.C.C. §§ 3-104(2)(b), 3R-104(f).

13. N.C.C.U.S.L., Draft Amendments to U.C.C. Article 3 — Negotiable Instruments, Prefatory Note, p. 1 (July, 1989).

14. WHITE & SUMMERS believe that the first two of these are the most significant changes in Article 3. See WHITE & SUMMERS, *supra* note 9, § 13-1 (Supp. 1993). Prof. Bailey believes that the adoption of comparative negligence is indeed significant but also ill-advised. See Bailey, *supra*

areas have been clarified by amendment or redrafting. These changes will be discussed more specifically following the discussion of matters of general application.

III. GENERAL DEFINITIONS

The definition of “bank” within Article 4 coverage has been expanded to include expressly savings and loans, savings banks, credit unions, trust companies, and any other person in the business of banking.¹⁵ “‘Account’ is defined as any deposit or credit account with a bank, including a demand, time, savings, passbook, share draft, or like account, other than an account evidenced by a certificate of deposit.”¹⁶ These definitions put to rest any doubts as to whether the rules of Article 4 apply to credit unions or savings and loan associations.

IV. STATUTE OF LIMITATIONS

The Revisions have added a specific statute of limitations, which did not previously appear in Article 3 and appeared only in a limited respect in Article 4¹⁷. An action to enforce a note payable at a definite time must be brought within six years after the stated accelerated due date.¹⁸ An action to enforce a demand note must be brought within six years after the demand. If no demand is made upon the maker, “an action to enforce the note is barred if neither principal nor interest on the note has been paid for a continuous period of 10 years.”¹⁹ If the instrument is a certified check, teller’s check, cashier’s check, or traveler’s check, the action must be brought within three years after demand for payment.²⁰ An action for conversion, breach of presentment or transfer warranty, or to enforce an obligation, duty or right under Articles 3R or 4 must be brought within three years after the cause of action accrues.²¹ These sections do not deal with all rules relating to statutes of limitations, such tolling the statute. Such matters are left to other law of the jurisdiction.²²

note 9, at 426-30.

15. § 4R-105(1) and cmt. 2.

16. § 4R-104(a)(1).

17. See § 4-406(4).

18. § 3R-118(a).

19. § 3R-118(b).

20. § 3R-118(d).

21. §§ 3R-118(g), 4R-111.

22. § 3R-118, cmt. 1.

V. NEGOTIABILITY AND HOLDERS IN DUE COURSE

A. *Form and Content*

Despite criticism of the concepts of negotiability and holder in due course²³ and the elimination of holders in due course in consumer transactions,²⁴ these two concepts remain a basic part of Revised Article 3, with some changes in the rules relating to the characteristics required for negotiability or for holding in due course.

Under Revised Article 3, the statement on consumer credit notes mandated by F.T.C. Regulation that the holder is subject to claims and defenses of the maker²⁵ no longer renders the note conditional, non-negotiable, and therefore outside the scope of Article 3.²⁶ Such notes remain within the scope and rules of the U.C.C., but the holder cannot be a holder in due course.²⁷

The Revision continues to require for negotiability the "words of negotiability," *i.e.*, that the instrument be "payable to bearer or to order at the time it is issued. . . ."²⁸ However, if the paper meets all of the requirements for being a check except that it lacks these words of negotiability, it nevertheless is negotiable and can be negotiated to a holder in due course.²⁹ Other drafts or promissory notes that lack the words of negotiability are not negotiable and are excluded from Revised Article 3 coverage unless the parties expressly agree to such coverage or the court applies the rules of the Code as a matter of common law development.³⁰ This is a change from Article 3, which provides that paper which is technically non-negotiable solely because it lacks the order or bearer words of negotiability is still governed by Article 3, but that there can be no holder in due course thereof.³¹

Under the Revision, an instrument that purports to be payable to the order of "a named person or bearer" is payable to bearer, not to order, whether or not

23. See, *e.g.*, GRANT GILMORE, *THE DEATH OF CONTRACT* 108-09 n.18 (1974); Grant Gilmore, *Formalism and the Law of Negotiable Instruments*, 13 CREIGHTON L. REV. 441 (1979); Albert J. Rosenthal, *Negotiability—Who Needs It?*, 71 COLUM. L. REV. 375 (1971).

24. See F.T.C. Reg., 16 C.F.R. § 433 (1993) (consumer credit contracts, including notes, must state that they are subject to the consumer's claims and defenses); Uniform Consumer Credit Code § 2.403 (1968 Version), IND. CODE § 24-4.5-2-403 (1988 & Supp. 1992) (negotiable instruments other than checks prohibited in consumer sales or leases other than for agricultural purposes; holder taking such instrument with notice of violation of this section not in good faith); WHITE & SUMMERS, *supra* note 9, § 14-8.

25. 16 C.F.R. § 433 (1993).

26. See §§ 3-104(1)(b), 3R-106, cmt. 3; WHITE & SUMMERS, *supra* note 9, § 14-8.

27. § 3R-106(d).

28. Compare § 3R-104(a)(1) with § 3-104(1)(d).

29. See § 3R-104(c), and cmt. 2.

30. *Id.*; see §§ 1-102(2)(b), 3R-104, cmt. 2.

31. § 3-805.

the “bearer” language is handwritten or is printed on a form check.³² This is a change in the law under § 3-110(3) which provides that an instrument payable to order of “a named person or bearer” is order paper unless the bearer language is hand- or type-written.³³

The Revision permits variable interest rate notes by permitting “reference to information not contained in the instrument,” but if the rate cannot be ascertained, it is payable at the then current judgment rate.³⁴ In 1990, the Indiana Legislature amended the then existing provision on interest rates stated in negotiable instruments to permit variable interest rates,³⁵ thereby avoiding a problem that had split other jurisdictions on whether variable interest rate promissory notes were negotiable.³⁶ The 1990 enactment, however, is more specific than the Revision in that it lists four points to which reference can be made; the Revision does not list any.³⁷ As the more recent enactment, the Revision supersedes the 1990 Indiana version of this Code section.

A note or draft is no longer made conditional and, therefore, non-negotiable because payment is limited to a particular fund or source.³⁸ The drafters explain that if potential buyers of instruments do not want to purchase such instruments, they need not do so, but such instrument should still be governed by Code rules. Market forces will control the popularity and price of such instruments.³⁹

32. See § 3R-109 and cmt. 2.

33. In the author’s experience, many rebate checks from manufacturers of goods who engage in various promotions have the name of a payee typed in, but the words “or bearer” are pre-printed in the same print as other pre-printed language on the check, such as “Pay to the order of.” Under Article 3, such checks are order paper and negotiable only by the named payee. Under the Revision, such checks are bearer paper and can be negotiated by anyone. Thus, the forgery of the named person’s signature would not break the chain of title because that signature is not necessary to the chain of title to bearer paper. A clever thief could take such checks from the mail and successfully negotiate them into the hands of holders in due course, thereby reaping a substantial, although illegal, profit at the expense of the drawer.

34. § 3R-112(b).

35. IND. CODE § 26-1-3-106 (Supp. 1992).

36. See Harold Greenberg, *Recent Developments in Contract and Commercial Law*, 24 IND. L. REV. 573, 575-76 (1991).

37. Compare § 3R-112(b) (“reference to information not contained in the instrument”) with IND. CODE § 26-1-3-106(1)(a)-(d) (Supp. 1992) (“reference in the instrument to: (a) a published rate or federal statute, regulation, or rule of court; or (b) a generally accepted financial index; or (c) a compendium of rates; or (d) an announced rate of a named financial institution”).

38. § 3R-106(b)(ii). Compare § 3-105(2)(b) which states that “[a] promise or order is not unconditional [and is therefore non-negotiable] if the instrument (b) states that it is to be paid only out of a particular fund or source”

39. § 3R-106, cmt. 1.

B. "Good Faith" and Notice

The Revision redefines "good faith" for the purposes of Articles 3 and 4 as "honesty in fact and the observance of reasonable commercial standards of fair dealing,"⁴⁰ thereby adding to the subjective "honesty in fact" test for good faith found in § 1-201(19) an objective standard of fair dealing in all Article 3 and 4 transactions. Prior to the Revisions, an objective standard applied only to the determination of whether a taker took with notice of problems so as to deprive her of holder in due course status.⁴¹ An addition in the Revision is a definition of "ordinary care," which "in the case of a person engaged in business means observance of reasonable commercial standards, prevailing in the area in which the person is located, with respect to the business in which the person is engaged."⁴² The drafters note that these definitions apply to both Articles 3R and 4 but are directed to different aspects of the same transaction. "Good faith" goes to the basic fairness of the transaction; "ordinary care" goes to the care with which the transaction is conducted.⁴³

Section 3R-307 adds new rules that clarify when a taker has notice of breach of fiduciary duty, thus depriving her of holder in due course status, and that impose stricter standards on the taker who deals with a fiduciary.⁴⁴ The section protects the taker by requiring "knowledge" of the fiduciary status of the transferor of the instrument before the specific rules for "notice" of breach of fiduciary duty come into play.⁴⁵ With such knowledge, the taker has the requisite notice of breach of duty if an instrument drawn by, or payable to, either the represented person or to the fiduciary as fiduciary is, with the knowledge of the taker, being used for the personal purposes of the fiduciary or the proceeds are going into an account other than that of the represented person or other than

40. § 3R-103(a)(4); see § 4R-104(c).

41. See § 3R-302(a)(2); Robert G. Ballen & Paul Homrighausen, *Revised Articles 3 and 4: Selected Topics*, 24 U.C.C. L.J. 3, 10-11 (1991). In *E. Bierhaus & Sons, Inc. v. Bowling*, 486 N.E.2d 598 (Ind. Ct. App. 1985), the court discusses and distinguishes between the subjective test of good faith and the objective test of lack of notice of problems with the transaction.

During the course of the enactment process, the Indiana Bankers Association proposed that the objective good faith standard of "observance of reasonable commercial standards of fair dealing" apply only to the issue of whether the taker becomes a holder in due course but not to other transactions under Articles 3 and 4 which would continue to be governed by the subjective, "honesty in fact" test. Why the Association sought this result is unstated. Its position was not adopted by the Legislature.

42. § 3R-103(a)(7).

43. See § 3R-103, cmts. 4, 5.

44. See Art. 3R prefatory note; § 3R-307, cmt 1. As noted in the official comment, the usual situation is one of embezzlement by the fiduciary for personal use. *Id.*, cmt. 2. For a comprehensive discussion of how the Revision treats fiduciary fraud, see Marion W. Benfield, Jr. & Peter A. Alces, *Bank Liability for Fiduciary Fraud*, 42 ALA. L. REV. 475 (1991).

45. See § 3R-307(b)(ii). "A person 'knows' or has 'knowledge' of a fact when he has actual knowledge of it." § 1-201(25).

the fiduciary's fiduciary account.⁴⁶ However, if the person represented or the fiduciary as fiduciary issues an instrument payable to the fiduciary personally, the taker is not charged with notice of impropriety unless she has knowledge of the breach of fiduciary duty.⁴⁷

In order to be a holder in due course, the taker must take without notice that it is overdue.⁴⁸ In an effort to clarify the rules regarding such notice, all demand instruments are overdue on the day after demand for payment is made.⁴⁹ With respect to demand instruments of which payment has not been demanded, a check is now overdue 90 days after its date, as compared to 30 days after date under old Article 3.⁵⁰ Other demand instruments are overdue when the instrument has been outstanding for an unreasonably long period of time.⁵¹

VI. CASHIER'S CHECKS, TELLER'S CHECKS, CERTIFIED CHECKS, AND TRAVELER'S CHECKS

Cashier's checks, teller's checks, certified checks, and traveler's checks, although negotiable instruments, are treated in the real world as the equivalent of cash. Article 3 contains no rules or definitions specifically applicable to these instruments other than to state that certification of a check by the drawee bank is acceptance of that check,⁵² that the accepting bank engages that it will pay the instrument,⁵³ and that the obligation underlying the issuance of an instrument is discharged "if a bank is drawer, maker or acceptor . . . and there is no recourse on the instrument against the underlying obligor. . . ."⁵⁴ Problems with these instruments have included whether payment can be stopped and, with respect to traveler's checks, who is liable when the countersignature is forged. The Revision defines each of these instruments⁵⁵ and states some specifically

46. See § 3R-307(b)(2),(4).

47. See § 3R-307(b)(3) and official comment 4; Ballen, 1991 *U.C.C. Survey*, *supra* note 9, at 1543-44.

48. §§ 3-302(1)(c), 3R-302(a)(2)(iii).

49. § 3R-304(a)(1).

50. Compare § 3R-304(a)(2) with § 3-304(3)(c).

51. § 3R-304(a)(3).

52. § 3-411(1).

53. § 3-413(1): "The maker or acceptor engages that he will pay the instrument according to its tenor at the time of his engagement"

54. § 3-802(1)(a).

55. § 3R-104:

(g) "Cashier's check" means a draft with respect to which the drawer and drawee are the same bank or branches of the same bank.

(h) "Teller's check" means a draft drawn by a bank (i) on another bank or (ii) payable at or through a bank.

(i) "Traveler's check" means an instrument that (i) is payable on demand, (ii) is drawn on or payable at or through a bank, (iii) is designated by the term "traveler's check" or by a substantially similar term, and (iv) requires, as a condition to payment, a countersignature by a person whose specimen signature appears on the instrument.

applicable rules. If the obligated bank, *i.e.*, the acceptor of a certified check or issuer of a cashier's or teller's check, refuses to pay or stops payment, the enforcer of the check may recover expenses, loss of interest, and consequential damages. Expenses and consequential damages are not recoverable if the bank "asserts a claim or defense of the bank that it has reasonable grounds to believe is available against" the enforcer, the bank has reasonable doubt about the enforcer's right to enforce the check, or payment is enjoined.⁵⁶ The drafters designed this section expressly to discourage the occasional practice of banks to refuse or stop payment of these instruments as an accommodation to their customers.⁵⁷ Short of being enjoined by a court of record, most banks will now pay these instruments rather than run the risk of substantial damages.

There is also a detailed procedure to be followed in the event that a certified, teller's, or cashier's check is lost, destroyed, or stolen from the drawer or remitter. The purpose of this section is to enable the drawer or remitter to obtain a refund of the amount involved without the necessity of posting an expensive bond but also to continue protecting the bank.⁵⁸

If any of these three types of checks is taken for an obligation, it is as if the obligor paid cash to the obligee and the obligation is discharged to that extent. However, if the obligor indorsed the instrument, indorser's liability continues.⁵⁹

With respect to traveler's checks, the requirement of a countersignature by the person whose signature already appears on the traveler's check does not make the instrument conditional and non-negotiable.⁶⁰ Moreover, the countersignature is not an indorsement but is for the purpose of identifying the owner of the instrument. Thus, if a forgery of the countersignature is relatively skillful and the taker of the traveler's check acts in good faith, the taker may be a holder in due course and cut off the defense of the issuer that the countersignature was forged. Because a countersignature is not an indorsement, the forgery does not break the chain of title. On the other hand, if the forgery is poor or if the purported signer is unable to present satisfactory identification when requested to do so, there may be notice that would deprive the taker of holder in due course status.⁶¹

§ 3R-409(d): "'Certified check' means a check accepted by the bank on which it is drawn."

56. § 3R-411(c) and the cmt. thereto.

57. *Id.*, cmt. 1.

58. See § 3R-312, and the cmt. thereto. The comment contains several hypothetical examples of how this section is intended to function.

59. See § 3R-310(a).

60. § 3R-106(c).

61. See *id.*, cmt. 2.

VII. AGENT AND CORPORATE LIABILITY

The Revision clarifies and changes some of the rules regarding the liability of principals and agents whose signatures do, or do not, appear on negotiable instruments.⁶² An important change is the provision in § 3R-402(a), which now makes an undisclosed principal liable on an instrument to the same extent the undisclosed principal would be bound if the signature were on simple contract despite the fact that the principal's signature does not appear on it and provided the agent had authority to represent the principal. The undisclosed principal is liable even though the agent signed only her own name, did not indicate agency status, and did not name the principal.⁶³ Although the undisclosed principal may be liable on the underlying obligation as a matter of agency law, the corresponding provision in Article 3⁶⁴ has been interpreted to impose liability on the instrument solely upon the agent but not on the principal unless the principal was actually named or otherwise indicated.⁶⁵ The justification for that result apparently was that the principal's signature did not appear on the instrument, and no one is ordinarily liable on an instrument he did not sign. Moreover, if the dispute was with the payee who knew that the agent was acting as agent, the agent indicated her representative capacity on the instrument, but the principal's name did not appear on the instrument, it was possible for neither the agent nor the principal to be liable on the instrument. The Revision is more in keeping with the law of agency with respect to the liability of an undisclosed principal.⁶⁶

Ordinarily, if the signing agent does not unambiguously sign in a representative capacity or if the principal is not identified in the instrument, the agent will be liable on the instrument to a holder in due course who took without notice that the agent was not intended to be liable.⁶⁷ However, the Revision makes clear that an authorized agent who, without indicating a representative capacity, signs a check that bears the principal's name is not liable on the check, even to a holder in due course.⁶⁸ As noted in the official comment, virtually all checks in current use identify the account owner, and "nobody is deceived into thinking that the person signing the check is meant to be liable."⁶⁹

This last provision would have simplified the decision process in *Highfield v. Lang*,⁷⁰ in which the corporate principal's name was printed on the checks

62. Prof. Bailey characterizes § 3-403 as "one of the more 'difficult' provisions" of old Article 3. Bailey, *supra* note 9, at 480.

63. See § 3R-402(a) and cmt. 1 thereto.

64. § 3-403.

65. See WHITE & SUMMERS, *supra* note 9, § 13-3.

66. § 3R-401, cmt. 1.

67. § 3R-402(b)(2).

68. § 3R-402(c).

69. *Id.*, cmt. 3.

70. 394 N.E.2d 204 (Ind. App. 1979).

but the signing agent did not indicate her representative capacity. After the checks were dishonored, the payee attempted to impose personal liability on the agent. The court observed that "[a]lthough the evidence was conflicting," there was evidence from which the trial court could reasonably conclude that the payee knew that the signing agent was a corporate vice-president, which absolved her of personal liability.⁷¹ Had the check found its way into the hands of a holder in due course, the then applicable Code provision would likely have resulted in agent liability.

VIII. FULL PAYMENT CHECKS AND ACCORD AND SATISFACTION

Section 3R-311 and a corresponding amendment to § 1-207 resolve a split in the jurisdictions and in scholarly opinion regarding both the use of "full payment" checks as an accord and satisfaction and the creditor's reservation of rights prior to indorsing such checks. At common law, when a debt was disputed, the debtor could offer an accord and satisfaction of the debt by sending a check to the creditor for a lesser amount than claimed and bearing language that the check was in full payment of the outstanding debt. By cashing the check, the creditor agreed to an accord and satisfaction. In the judgment of some courts and scholars, the enactment of § 1-207 enabled creditors to note a reservation of rights on such a check prior to indorsement, thereby preserving the balance of the claim. The majority of courts, however, determined that § 1-207 did not change the common law rule.⁷²

Accompanying Revised Article 3 is an amendment to the § 1-207 provision on reservation of rights stating expressly that the section "does not apply to an accord and satisfaction."⁷³ Further, § 3R-311 states specific rules that apply when a debtor⁷⁴ on an unliquidated or disputed claim, in good faith, tenders an instrument in full payment, and the claimant obtains payment of the instrument. If the instrument or accompanying memo states conspicuously that it is in full satisfaction of the disputed claim, the claim is discharged. However, it will not be discharged if the payee is an organization that had previously notified the debtor that disputes, including full satisfaction checks, were to be sent to a specific person or place and the instrument was not received by that person or

71. *Id.* at 206. See generally Gerald L. Bepko, *Contracts, Commercial Law, and Consumer Law*, 14 IND. L. REV. 223, 236-38 (1981).

72. See, e.g., WHITE & SUMMERS, *supra* note 9, § 13-24; Nadine DeLuca Elder, Note: *Displacing Accord and Satisfaction in Massachusetts with U.C.C. Section 1-207*, 25 SUFFOLK U. L. REV. 637 (1991); Patricia B. Fry, *You Can't Have Your Cake and Eat It Too: Accord and Satisfaction Survives the Uniform Commercial Code*, 61 N.D. L. REV. 353 (1985); W. Jack Grosse & Edward P. Groggin, *Accord and Satisfaction and the 1-207 Dilemma*, 89 COMM. L.J. 537 (1984); W. Jack Grosse & Edward P. Groggin, *The 1-207 Dilemma Revisited*, 16 N. KY. L. REV. 425 (1989); Arthur J. Rosenthal, *Discord and Dissatisfaction: Section 1-207 of the Uniform Commercial Code*, 78 COLUM. L. REV. 48 (1978).

73. § 1R-207(2).

74. § 3R-311 uses the term "person against whom a claim is asserted."

at that place. The organization also avoids discharge by tendering repayment of the amount involved within 90 days after payment.⁷⁵ Furthermore, the claim is discharged if the claimant, or an agent with direct responsibility over the claim, knew before payment of the instrument that the instrument had been tendered in full satisfaction.⁷⁶

The drafters state that these rules follow the common law, “with some minor variations to reflect modern business conditions.”⁷⁷ In particular, they protect larger business organizations from inadvertent accord and satisfaction that might result from automatic check processing procedures, either by clerks or computers or both.⁷⁸

IX. ACCOMMODATION PARTIES AND SURETYSHIP

The rules on accommodation parties and suretyship in §§ 3-415, 3-416, and 3-606 have been clarified, modified, and expanded in §§ 3R-419 and 3R-605.⁷⁹ Although many suretyship defenses are commonly waived by express terms of promissory notes as a matter of standard commercial practice, occasions arise when such waiver provisions do not appear in the note or the creditor does not specifically obtain the permission of the accommodation party or surety to take the particular action on which the surety later bases her defense.⁸⁰

Of particular note is the Revision’s elimination of the “reservation of rights” doctrine. Under Article 3, if the holder of an instrument, without the surety’s consent, releases or agrees not to sue the debtor or agrees to an extension of time for payment, the surety is discharged unless the holder expressly reserves his rights against the surety.⁸¹ Moreover, it is not necessary for the holder to notify the surety of the reservation of rights.⁸²

Section 3R-605(b) states specifically that discharge of the debtor does not discharge an indorser or accommodation party with a right of recourse against the debtor. Furthermore, if the creditor grants to the debtor an extension of the instrument’s due date, the surety is discharged only to the extent she can prove that the extension caused loss to her with respect to her right of recourse.⁸³ If the creditor grants any other modification of the debtor’s obligation, the surety

75. § 3R-311(c).

76. § 3R-311(d).

77. *Id.*, cmt. 3.

78. *Id.*, cmt. 5.

79. For an in depth analysis of the Revision’s suretyship provisions, see Neil B. Cohen, *Suretyship Principles in the New Article 3: Clarifications and Substantive Changes*, 42 ALA. L. REV. 595 (1991). Prof. Cohen is the Reporter of the RESTATEMENT OF THE LAW (THIRD) SURETYSHIP. *Id.*

80. See § 3R-605, cmt. 2.

81. See § 3-606, and cmt. 4 thereto.

82. WHITE & SUMMERS, *supra* note 9, § 13-17. The authors note that there was a notice requirement in the 1952 Official Text, but it was deleted from the 1958 Official Text. *Id.* at note 7.

83. § 3R-605(c).

is discharged to the extent of any loss caused to her right of recourse as a result of the modification. However, the burden is on the creditor to prove that the loss was less than the full amount of the surety's recourse against the debtor.⁸⁴

If the creditor impairs any collateral which accompanies the instrument, the surety is discharged to the extent of the impairment.⁸⁵ Impairment of collateral is described as failure to perfect a security interest in it, release of collateral without obtaining a substitution, failure to preserve collateral in accord with Article 9, or failure to comply with applicable law in disposing of the collateral.⁸⁶ In a situation in which the obligors on an instrument each have a right of contribution against the other and one of them posts the collateral, impairment of the collateral will discharge a party to the extent that he must pay more than he would have had to pay, taking into account his right of contribution from the other party, had the collateral not been impaired.⁸⁷ The typical situation would be one in which co-makers sign a note, co-maker A posts collateral that the holder subsequently impairs, co-maker A becomes insolvent, and co-maker B must pay the entire debt. Had the collateral not been impaired by the holder, co-maker B would have had recourse to the collateral, at least for his share of the debt.⁸⁸

X. FRAUD, FORGERY, FICTITIOUS PAYEES, FAITHLESS EMPLOYEES, IMPOSTERS AND COMPARATIVE NEGLIGENCE

A frequent problem arising under Article 3 is what to do when a dishonest employee engages in one of several courses of conduct: (1) He supplies to his employer the names of fictitious or real payees with the intention of taking the checks after they are issued and indorses in the name of the named payees; (2) he steals checks payable to the employer and forges the employer's indorsement; or (3) he forges the employer's signature as drawer on the employer's own checking account.⁸⁹ Depending on the facts, application of the rules of Article 3 to these typical problems resulted in "winner take all," regardless of any negligence of the other party or parties.⁹⁰ Thus, in *M & K Corp. v. Farmers State Bank*,⁹¹ which involved checks drawn to the order of fictitious payees by employees with authority to sign checks, the court concluded that, pursuant to the plain language of § 3-405, indorsements in the names of the fictitious payees were effective, thereby precluding the employer from recovering the amount of

84. § 3R-605(d).

85. § 3R-605(e).

86. § 3R-605(g).

87. See § 3R-605(f).

88. See *id.*, cmt. 7.

89. See §§ 3-405, 3-406, 4-406; Donald J. Rapson, *Loss Allocation in Forgery and Fraud Cases: Significant Changes under Revised Articles 3 and 4*, 42 ALA. L. REV. 435 (1991).

90. See Rapson, *supra* note 89, at 458.

91. 496 N.E.2d 111 (Ind. Ct. App. 1986).

the checks from either the bank that cashed the checks or the drawee bank that paid them, notwithstanding the cashing bank's negligence in failing to request identification.⁹² The court noted that notwithstanding the harshness of strict application of § 3-405 to preclude consideration of the bank's negligence, the statute was plain and unambiguous and had been similarly interpreted in other jurisdictions.⁹³

Similarly, in *Indiana National Corp. v. FACO, Inc.*,⁹⁴ an employee who had no authorization to sign checks wrote 167 checks totaling \$51,800 to his own or his daughter's order and forged his employer's signature to the checks. The trial court found that the employer, in failing to examine the monthly bank statements or audit the account, had failed to exercise the care required under § 4-406(1) and (2) and would ordinarily have been precluded from demanding recredit of the checks to its account.⁹⁵ However, the trial court also found that the drawee bank was negligent in paying the checks and that, pursuant to § 4-406(3), the preclusion against the drawer's demand for recredit did not apply.⁹⁶ The court of appeals affirmed the findings of the trial court regarding bank negligence but remanded for deduction from the judgment amount the total of those checks written prior to the one year statutory bar of § 4-406(4).⁹⁷

The Revision has resolved the unfairness of both these results by adopting a comparative negligence standard. Under §§ 3R-404(d) and 3R-405(b), if the person paying or taking the instrument fails to exercise ordinary care and that failure "substantially contributes" to the loss involved, the party initially bearing the loss may recover "to the extent the failure to exercise ordinary care contributed to the loss."⁹⁸ Thus, the loss in the *M & K Corp.* case would be allocated between the employer, whose employees drew checks to fictitious payees and whose indorsements in the names of those payees were therefore

92. In addition to fictitious payees, some of the checks were drawn to the order of real payees but with the intention that those payees have no interest in the checks. *Id.* at 112. Under § 3-405(1)(b), the result is the same, *i.e.*, any indorsement in the name of the payee is effective. § 3-405(1)(b).

93. 496 N.E.2d at 114-15 (citing *Merrill Lynch, Pierce, Fenner & Smith v. Chemical Bank*, 442 N.E.2d 1253 (N.Y. 1982)). The court of appeals noted that a California case, *E.F. Hutton & Co. v. City Nat'l Bank*, 196 Cal. Rptr. 614, *reh. denied* (Cal. Ct. App. 1983), had ruled that a bank may be liable despite the language of § 3-405. However, the Indiana court concluded that this conflicted with the plain meaning of the statute. 496 N.E.2d at 113-15.

94. 400 N.E.2d 202 (Ind. Ct. App. 1980).

95. *Id.* at 205.

96. *Id.*

97. § 4-406(4) states:

Without regard to care or lack of care of either the customer or the bank a customer who does not within one (1) year from the time the statement and items are made available to the customer . . . discover and report his unauthorized signature . . . is precluded from asserting against the bank such unauthorized signature

98. §§ 3R-404(d), 3R-405(c).

effective, and the bank that negligently failed to demand any identification at the time it cashed the checks.⁹⁹

Under § 4R-406(d) and (e), although a customer, as a consequence of his own failure to examine his bank statements and to report forgeries in time to prevent loss to his bank, may be precluded from requiring his bank to recredit those checks, if he proves that his bank failed to exercise ordinary care and contributed to the loss, the loss will be allocated between them. Under this provision, the result in *Indiana National Corp. v. FACO, Inc.*, would be the allocation of the loss between the drawer and the drawee bank. The bar against recovery for forgeries more than one year old, regardless of either party's negligence, remains the same.¹⁰⁰

With respect to forged indorsements by an employee, whether the forgery is the employer's indorsement or the indorsement of another payee, the policy of the Revision, as codified in § 3R-405, is to place the loss on the employer, provided the employee was one entrusted with responsibility for checks and the bank was not negligent.¹⁰¹ The section "is based on the belief that the employer is in a far better position to avoid the loss by care in choosing employees, in supervising them, and in adopting other measures to prevent forged indorsements"¹⁰² In the event the employer can prove the bank failed to exercise ordinary care, thereby contributing to the loss, the loss will be allocated between the parties.¹⁰³

A further change that imposes liability on the party in the better position to avoid the loss appears in § 3R-404(a). Under § 3-405(1)(a), anyone could validly indorse a check or note in the name of the payee if the instrument was procured by an imposter who induced the maker or drawer to issue it to the order of the imposter or a confederate. However, the official comment thereto states that if the person procuring the check or note misrepresents his authority to act for a principal, the drawer or maker is entitled to have the genuine indorsement

99. It is interesting to note that early in the legislative process, some Indiana banking interests proposed an amendment to Senate Bill 197 (the Revisions) to delete the comparative negligence standard in §§ 3R-404 and 3R-405 and to codify the result in *M & K Corp.* See Memorandum from Indiana Bankers Ass'n to Indiana Senator Vi Simpson 3-4 (Feb. 12, 1993) (copy on file with the author).

100. See § 4R-406(f). It is of interest to note that the Indiana Bankers' Association did not object to the adoption of a comparative negligence standard in § 4R-406. See Memorandum from Indiana Bankers Ass'n, *supra* note 99, and the discussion therein. Had § 4-406(3) remained unchanged, negligent banks would remain liable for the full amount of loss despite customer negligence. It appears that the Association is willing to agree to a standard of comparative negligence only when it derives some benefit from that standard but not when the standard would impose some liability for bank negligence. Is this a case of the banks wanting their cake and their penny too?

101. § 3R-405, cmt. 1.

102. *Id.*

103. § 3R-405(b).

of that principal.¹⁰⁴ Section 3R-404(a), however, makes the indorsement effective if the imposter impersonates either the payee or a person authorized to act for the payee, *i.e.*, an agent, who obtains the instrument payable to the order of the alleged principal.¹⁰⁵

In *Insurance Co. of North America v. Purdue National Bank of Lafayette*,¹⁰⁶ the drawer was induced to issue two checks to the order of named payees by someone who represented that he was authorized to act on their behalf, but the drawer failed to make inquiry into his authority. The court concluded that the drawer was negligent in failing to investigate the authority of the alleged agent and that such negligence substantially contributed to the forged indorsements, thereby precluding the drawer from asserting the forgery pursuant to § 3-306.¹⁰⁷ Although this result seems equitable, it also appears to be contrary to the intention of § 3-405, as expressed in the official comment, which indicates that the drawer is entitled to protection if the check is drawn to the alleged principal. Under § 3R-404(a), however, the indorsements would be effective in any event because the imposter misrepresented that he had authority to act on behalf of the alleged principals. The ultimate result of the case would be the same, but it would be achieved without the court having to stretch its reasoning between two sections of the Code and resolving an apparent conflict between them.

XI. CHECK TRUNCATION AND THE DUTY TO EXAMINE BANK STATEMENTS

Two additional significant changes in the Revisions are the authorization of radical check truncation and the adoption of comparative negligence as the standard to be applied when the drawer negligently fails to examine his bank statement but the drawee bank is also negligent in paying the check. These two changes are interrelated because radical truncation eliminates the physical return of the checks themselves to the drawer or to the drawee bank, but in reviewing his statement, the drawer must have a sufficient amount of information to detect forgeries or alterations.

As the check collection system is envisioned under present Article 4, a typical transaction involves the deposit by the payee, the encoding of the amount of the check in the Magnetic Ink Character Recognition (MICR) line at the bottom of the check by the depository bank, the forwarding of the check to a collecting bank (either a Federal Reserve branch or a clearinghouse), and the presentment of the check for payment to the drawee or payor bank. In the process, the check itself moves through the system, but, after the encoding, no humans look at the check; its MICR line is read by the computers that handle the

104. See § 3-405, cmt. 2.

105. See § 3R-404(a) and cmt. 1 thereto.

106. 401 N.E.2d 708 (Ind. Ct. App. 1980).

107. *Id.* at 715.

check. If the drawee bank pays the check, the drawee includes the canceled check itself in the periodic statement to the drawer or makes the check available to the drawer.¹⁰⁸ The drawer then reconciles the returned checks against the check register. Drawee banks seldom make any comparisons between the drawer's signature as it appears on the checks and as it appears on the signature card on file.¹⁰⁹ Thus, the ultimate duty to detect a forged drawer's signature is actually on the drawer. If there are any irregularities (forged drawer's signature or alteration) with respect to the check, it is the drawer's responsibility to report these to the drawee bank within a reasonable time. If the drawer fails to do so, the drawer may be precluded from asserting that the forged or altered checks must be recredited by the drawee because they were not properly payable from the drawer's account. Moreover, if there are a series of forgeries by the same person, any forged checks paid within a period beginning fourteen days after the statement and checks are available to the drawer and ending when the drawer does complain need not be recredited to the drawer's account.¹¹⁰

The drawee's failure to compare signatures, as noted above, raises the issue of whether that failure is negligence, which under § 4-406(3) places full responsibility for the forged checks on the drawee regardless of the drawer's own failure to examine the bank statement as the earlier part of the same section requires. Some courts have held that indeed it does; others have held that it does not.¹¹¹

With standard truncation, the drawee bank merely retains the item and submits a report of paid checks to the drawer. With radical truncation, the depository bank keeps the check itself and forwards nothing more than an electronic signal via computer and modem. The drawee bank's computer determines whether or not to pay the check based on such things as the availability of funds in the drawer's account or the existence of any stop payment orders or attachments of the account. Neither the drawee bank nor the drawer ever see the check itself. This system of radical truncation obviously speeds up the collection process by eliminating the need to deal with billions of pieces of paper, many of which must physically travel long distances, perhaps over several days. Instead, the entire process may take no more than a few minutes of electronic interchange. However, current Article 4 places impediments in the way of radical truncation, particularly the requirement that a bank sending the statement to its customer either include or make available the canceled

108. See § 4-406(1).

109. See WHITE & SUMMERS, *supra* note 9, § 16-3, at 75 (Supp. 1993).

110. § 4-406(2).

111. Compare, e.g., *Medford Irrigation Dist. v. Western Bank*, 676 P.2d 329 (Or. Ct. App. 1984) (failure to compare signatures constitutes lack of ordinary care as a matter of law) with *Wilder Binding v. Oak Park Trust & Sav. Bank*, 552 N.E.2d 783 (Ill. 1990) (failure to compare is a question of fact dependent on banking usage); see WHITE & SUMMERS, *supra* note 9, § 16-3.

checks.¹¹² The drawee bank simply does not have those checks to send in a system of radical truncation.

Revised Article 4 facilitates the adoption of radical truncation in several provisions. First, it expressly authorizes banks to enter agreements “for electronic presentment . . . by transmission of an image of an item or information describing the item (‘presentment notice’) rather than delivery of the item itself.”¹¹³ In addition, “ordinary care” has been defined so as to eliminate the drawee’s examination of checks presented for payment by automated means, i.e., electronically, provided the bank follows standard banking practices.¹¹⁴ Finally, if the checks are not returned because of truncation, the bank at the point of truncation shall either retain the checks themselves or maintain the capacity to furnish legible copies for seven years. The drawee bank, however, must furnish sufficient information for the drawer to be able to reconcile her account, at a minimum, the item number, the amount, and the date of payment, and must provide either the check or a legible copy if requested by the drawer to do so.¹¹⁵ Furthermore, at the point of truncation, the bank that encodes and retains the check warrants that the check was encoded correctly and that the retention and presentment of the check comply with the electronic presentment agreement. If these warranties are breached, the injured party may recover for the loss suffered, plus expenses and interest.¹¹⁶

As with the former provision, the drawer is required to examine her bank statement or be precluded from asserting a forgery or alteration.¹¹⁷ The grace period for reporting serial forgeries by the same individual is extended from fourteen to thirty days. However, as noted earlier, if the drawer negligently fails to examine her bank statement but is able to prove that the bank failed to exercise ordinary care and that failure substantially contributed to the loss, the loss is allocated between them on a comparative fault basis rather than being placed entirely on the bank, as under the older provision.¹¹⁸ Moreover, the official comments note that a bank will not share the loss solely because it

112. § 4-406(1), discussed *supra* note 105.

113. § 4R-110(a); *see* § 4R-103.

114. § 3R-103(a)(7) states, in part,

[In the case of a payment] by automated means, reasonable commercial standards do not require the bank to examine the instrument if the failure to examine does not violate the bank’s prescribed procedures and the bank’s procedures do not vary unreasonably from general banking usage not disapproved by this Article or Article 4.

This definition is expressly incorporated into Article 4 by § 4R-104(c).

115. § 4R-406(a), (b).

116. § 4R-209.

117. *Compare* § 4-406 with § 4R-406.

118. § 4R-406(e). *See* the discussion of the position of the Indiana Bankers’ Association on this issue, *supra* note 100.

follows automated collection and payment procedures (and failed to examine the signature).¹¹⁹

XII. POST-DATED CHECKS, OVERDRAFTS, PROPER PAYMENT, AND WRONGFUL DISHONOR

It has long been the rule that banks may only charge against a customer's account those items that are properly payable from the account.¹²⁰ It has also been the rule that although a check drawn against insufficient funds may be dishonored by the drawee, such a check is nevertheless properly payable if the drawee chooses to pay it.¹²¹ However, Article 4 gave no guidance as to what happens when the drawer deposits funds to cover a check originally drawn on insufficient funds after the drawee bank has determined the account to be insufficient, but prior to the bank's actual dishonor and return of the check, and whether the drawee bank must examine the account again prior to its midnight deadline before dishonoring the check.¹²² Section § 4R-402(c) provides that the drawee may examine the drawer's balance at any time between the presentment of the check and its return to the presenter and that the drawee need examine the account only once before deciding to dishonor. A dishonor for insufficient funds at that time is not wrongful even if the drawer deposits funds to cover the check before the bank's midnight deadline. If the bank does elect to reexamine the account, the balance at the time of reexamination controls, and the dishonor is wrongful if the account then contains sufficient funds.

It has also been the rule that a post-dated check is not properly payable until after its stated date, and that payment of such a check that depletes the drawer's account and causes other checks to be dishonored may result in drawee liability for wrongful dishonor.¹²³ Under current electronic processing procedures, however, the depository bank does not encode the date, and the drawee receives no notice in the presentment process that the check is post-dated and not properly payable. In order to facilitate electronic check processing procedures and to avoid imposing unreasonable burdens on drawee banks, § 4R-401(c) provides that a drawee bank may properly charge a post-dated check against the drawer's account unless the drawer notifies the bank that the check is post-dated, essentially in the same manner that the drawer would give the bank a stop-payment order under § 4-403.

Finally on the subject of overdrafts, if a checking account is jointly held and one authorized drawer writes a check that creates an overdraft, the other drawer

119. § 4R-406, cmt. 4.

120. See §§ 4R-401, 4-401.

121. *Id.*

122. See § 4R-402, cmt. 4.

123. See § 4R-401, cmt. 3.

is not liable for the amount of the overdraft unless she also signed the check or benefitted from the proceeds.¹²⁴

XIII. PRESENTMENT AND TRANSFER WARRANTIES AND A CASE OVERRULED

The original Code provisions that govern both warranties on the presentment of instruments for payment and warranties on the prior transfers of those instruments are §§ 3-417 and 4-207.¹²⁵ It would be generous to say that these sections are less than clear.¹²⁶ The Revisions have separated and clarified presentment and transfer warranties by separating the two types of warranties into distinct sections and by simplifying the language used in each.¹²⁷ The basic warranties themselves continue relatively unchanged. In particular, the rule of *Price v. Neal*,¹²⁸ that the drawee takes the risk of paying a draft bearing a forged drawer's signature, continues in full force.¹²⁹

One language change is of particular importance in Indiana because it overrules a position taken by the Indiana Court of Appeals. In *Insurance Co. of North America v. Purdue National Bank of Lafayette*,¹³⁰ two checks of the drawer were paid by the drawee bank despite the presence of forged indorsements. Rather than seek reimbursement from the drawee bank for making an improper payment, which would have been the appropriate course of action, the drawer (actually the drawer's insurance subrogee) pursued the collecting bank. One of the claims was breach of the presentment warranty of good title under §§ 3-417(1)(a) and 4-207(1)(a). The language of these sections gave the benefit of

124. § 4R-401(b), and the cmt. thereto.

125. § 3-417 applies to all presentments and transfers outside the bank collection system, whether the instruments are notes or drafts. § 4-207 applies to banks and bank customers within the bank collections system. As noted in the official comment to § 4-207, except for certain matters applicable only to bank customers and collecting banks, the two sections are identical in substance. §4-207, cmt. 1.

126. WHITE & SUMMERS characterize the two sections as "a mess." They continue, "[t]he language is dense and lawyers with the most adroit minds cannot understand them." WHITE & SUMMERS, *supra* note 9, §15-5 (Supp. 1993). Prof. Whaley agrees and comments about the presentment warranties of §3-417(1), "[I]f you don't know what it means when you read it, you'll never figure it out on your own." DOUGLAS J. WHALEY, PROBLEMS AND MATERIALS ON PAYMENT LAW 184 (3d ed. 1992). The drafters themselves conceded, "The former provision was difficult to understand The result was a provision replete with exceptions that could not be readily understood except after close scrutiny of the language." § 3R-417, cmt. 1.

127. See §§ 3R-416 (Transfer Warranties), 3R-417 (Presentment Warranties), 4R-207 (Transfer Warranties), 4R-208 (Presentment Warranties).

128. 97 Eng. Rep. 871 (K.B. 1762).

129. See §§ 3R-417(a)(3), and cmt. 3 thereto; 4R-208(a)(3). This is in accord with Indiana's express recognition of the rule of *Price v. Neal*. See *Payroll Check Cashing v. New Palestine Bank*, 401 N.E.2d 752, 755 (Ind. Ct. App. 1980). The rule continues in effect despite judicial and scholarly criticism over the years. See Whaley, *supra* note 126, at 313.

130. 401 N.E.2d 708 (Ind. Ct. App. 1980), discussed in connection with the imposter rule, *supra* in the text accompanying note 104.

the presentment warranty to "a person who in good faith pays"¹³¹ and to "the payor bank or other payor who in good faith pays."¹³² The issue was whether a drawer, from whose account the checks were paid, is a "person" or "other payor" who pays. Noting that there was no case on point in Indiana and that there was a split in the decisions of other states, the court quoted extensively from, and adopted the reasoning of, *Sun 'N Sand, Inc. v. United California Bank*,¹³³ rejected contrary authority, and declared that the drawer is such a payor with a right of action for breach of presentment warranty.¹³⁴

The Revisions have been redrafted to provide that presentment warranties run only in favor of the drawee,¹³⁵ and the official comment expressly rejects the *Sun 'N Sand* rule that the warranty was also made to the drawer.¹³⁶ Both the language of the Revisions and of the official comment indicate clearly that breach of the presentment warranties may not be asserted by the drawer, that the *Insurance Company of North America* case should no longer be considered good law on this point, and that the only redress of an aggrieved drawer when a check is paid over a forged indorsement is against the drawee bank.

XIV. CONVERSION LIABILITY

The Code provision on conversion of instruments, § 3-419, has been roundly criticized as being poorly drafted with respect to identifying or failing to identify proper plaintiffs, proper defendants, the theory of recovery, or the measure of damages.¹³⁷ Section 3R-420 has remedied these problems. The theory of recovery is the law of conversion applicable to all personal property, and the measure of damages is presumed to be the face amount of the instrument but no more than the plaintiff's interest in it.¹³⁸ The proper plaintiff is the payee of the instrument or a subsequent holder; the drawer has no cause of action in conversion.¹³⁹ This position resolves a split in the jurisdictions in favor of the

131. § 3-417(1).

132. § 4-207(1).

133. 582 P.2d 920 (Cal. 1978).

134. 401 N.E.2d at 712-14. As noted in the earlier discussion of this case, *supra* notes 104 and accompanying text, the court also ruled that the failure of the drawer to investigate the authority of the person requesting the checks to act on behalf of the named payees was negligence on the part of the drawer so as to preclude it from claiming a right to recredit.

135. §§ 3R-417(a), 4R-208(a). An exception is when a draft is dishonored by the drawee and is then presented directly to the drawer or an indorser for payment. *See* §§ 3R-417(d); 4R-208(d).

136. § 3R-417, cmt. 2; *see* § 4R-208, cmt.

137. *See* WHITE & SUMMERS, *supra* note 9, § 15-4, in which the authors call it "a haphazard (critics might even say half-ass) codification;" § 15-5, in which they comment that what courts have done to § 3-419(3) "shouldn't happen to a dog;" and § 15-4 (Supp. 1993), in which they state that the existing provision "has many warts and blemishes that detract substantially from its beauty, if not its efficacy."

138. § 3R-420(a), (b).

139. § 3R-420(a).

majority, which includes Indiana, that the drawer does not have a cause of action for conversion if a check is paid over a forged indorsement.¹⁴⁰ Rather, the drawer's action is against the drawee bank for paying a check that was not properly payable.¹⁴¹

Under § 3-419(3), much confusion arose as to whether and when the depository or other collecting banks were proper defendants in an action for conversion because of a forged indorsement. The section appears to have been drafted originally with the intention of requiring the conversion suit to be brought against the drawee or payor bank, with that bank then suing up the line for breach of presentment warranty. However, this course of action would frequently result in multiple lawsuits.¹⁴² Section 3R-420(c) permits the payee to bring suit against both the drawee bank that paid the check and the depository bank that took the check with the forged indorsement in the first place.¹⁴³

XV. FINAL PAYMENT AND RECOVERY PAYMENT BY MISTAKE

Sections 4-213 and 3-418, which dealt with final payment of checks and recovery of payments by mistake, created some confusion as to the circumstances under which banks could reverse entries before becoming accountable, *i.e.*, liable for the amount of checks and also recover mistaken payments.¹⁴⁴ Section 4R-215 has eliminated the process of posting the check to the drawer's account as a point marking final payment, thereby marking that point as only paying the item in cash, settling without a right to revoke, or allowing the midnight deadline to pass.

Section 3R-418 now provides that if a bank pays or accepts a check in the mistaken belief that no valid stop order existed or that the signature of the drawer was authorized, the bank may recover the payment or revoke the

140. See § 3R-420, cmt. 1, ¶ 2; *Insurance Co. of North America v. Purdue Nat'l Bank of Lafayette*, 401 N.E.2d 708, 710-11 (Ind. Ct. App. 1980) (discussed *supra* at note 130 and the accompanying text with reference to the cause of action for breach of warranty).

141. See §§ 3R-401, 3-401.

142. See WHITE & SUMMERS, *supra* note 9, §§ 15-5, 15-4 (Supp. 1992). In addition to the suits by the drawee bank, the payee from whom several checks may have been stolen would be required to sue each drawee bank rather than a single depository into which the thief is likely to have deposited the checks. Moreover, the depository bank is likely to be in the same jurisdiction as the payee whereas the drawee banks could be anywhere, thus making it more difficult for the aggrieved payee to obtain relief.

143. § 3R-420(c), and cmt. 3.

144. The confusion with respect to the time of final payment under § 4-213 apparently started with *West Side Bank v. Marine Nat'l Exchange Bank*, 155 N.W.2d 587 (Wis. 1968), in which the court held that a payor bank could reverse an entry of payment at any time before its midnight deadline despite the fact that all of the steps to complete the process of positing, one of the indicia of final payment, had apparently been taken. See Walter Malcom, *Reflections on West Side Bank: A Draftsman's View*, 18 CATHOLIC U. L. REV. 23 (1968). Also, see, *e.g.*, WHITE & SUMMERS, *supra* note 9, § 17-2 (Supp. 1993), in which the authors acknowledge their own change of position between the second and third editions of their text with respect to when mistaken payments may be recovered.

acceptance except as against a holder in due course or person who has otherwise changed her position. The Official Comment notes that this preserves the doctrine of *Price v. Neal*¹⁴⁵ that payment over a forged drawer's signature remains the responsibility of the payor or drawee since there usually is a holder in due course or person who has changed position in the chain of title.¹⁴⁶

XVI. CONCLUSION

The Revisions will go a long way to clarifying problems and issues which have arisen under the original versions of Articles 3 and 4. They are not cure-alls. Many of the commentators referred to throughout this survey have already pointed to problems and omissions that might have been resolved in the drafting process but, for one reason or another, were not. It remains for the courts to sort these problems out. Nevertheless, the changes, coupled with the extensive official comments, should be of considerable help in aiding courts and practitioners to understand the law of negotiable instruments.

One final comment. The orientation of the Revisions, as that of the original articles they replace, favors the financial and banking industries. Whatever protection there may be for bank customers, whether businesses or ordinary consumers, must come from other law. The goal of the revisers was to bring the banking and financial industries into the modern age of computer technology and to facilitate further developments as technology grows. Today, it appears that this goal has been achieved, if not perfectly, then reasonably well.

145. 97 Eng. Rep. 871 (K.B. 1762) discussed *supra* note 128 and accompanying text.

146. § 3R-418, cmt. 1.

1993 FEDERAL PRACTICE AND PROCEDURE UPDATE FOR SEVENTH CIRCUIT PRACTITIONERS

JOHN R. MALEY*

INTRODUCTION

Indiana practitioners litigating in federal court encountered drastic changes in federal civil practice during 1993. At the national level, substantial amendments to the Federal Rules of Civil Procedure took effect December 1, 1993. In the Seventh Circuit, several questions of first impression were decided. Locally, the Southern District of Indiana partially opted out of the mandatory disclosure provisions of amended Fed. R. Civ. P. 26(a), and the Northern District of Indiana enacted new local rules effective January 1, 1994. This Article highlights these and other key developments in an effort to assist Indiana attorneys in their federal civil litigation. The subjects are presented in the order in which they often arise in litigation.

I. SUBJECT MATTER JURISDICTION

A. Diversity Jurisdiction

Although diversity jurisdiction should be simple and rarely litigated, neither proposition held true during the survey period. One recurring mistake is the failure to consider the citizenship of *all* partners—general and limited—when a limited partnership is a party. In *Carden v. Arkoma Associates*,¹ the Supreme Court held several years ago that a limited partnership is a citizen of every state of which any partner, general or limited, is a citizen.

In a recent Seventh Circuit case, however, the *Carden* rule was ignored at every stage, leading to a dismissal on appeal after a full trial on the merits. In *America's Best Inns v. Best Inns of Abilene*,² the complaint identified the defendant as a "Kansas limited partnership" without elaboration. The defendant's answer did not detect the problem, nor did the Magistrate Judge in Southern Illinois, who held trial and entered judgment on the merits for defendant.

Appeal was taken, but the failure to address jurisdiction continued. Despite a Seventh Circuit rule specifically requiring the citizenship of all members of a partnership to be listed,³ neither party did more than simply list the defendant

* Associate, Barnes & Thornburg, Indianapolis; Adjunct Professor, Indiana University School of Law—Indianapolis; Lecturer, Indiana Bar Review. B.A., 1985, University of Notre Dame; J.D., *summa cum laude*, 1988, Indiana University School of Law—Indianapolis; Law Clerk to the Honorable Larry J. McKinney, U.S. District Court, Southern District of Indiana, 1988-90.

1. 494 U.S. 185 (1990).

2. 980 F.2d 1072 (7th Cir. 1992).

3. Seventh Circuit Rule 28(b)(1) ("If any party is an unincorporated association or

as a limited partnership with its principal place of business in Kansas. Oral argument was likely unpleasant, for the panel reminded counsel of the deficiency and ordered the record to be enlarged to show the citizenship of every partner as of the date the complaint was filed. Counsel failed to do this, however, and instead supplied cursory affidavits of their own stating that they believed diversity existed.

This was the final blow leading to an outright dismissal of the action:

These litigants have had chance after chance to establish diversity of citizenship—the complaint, the answer, the jurisdictional statements in their appellate briefs, and finally the memoranda and filings . . . called for at oral argument. Despite receiving express directions about what they had to do, counsel did not do it. At some point the train of opportunities ends. The parties' reluctance to supply the court with essential details supports an inference that jurisdiction is absent; at all events, it is the obligation of the plaintiff to establish jurisdiction, and in this obligation the plaintiff failed.⁴

The *Best Inns* decision also reiterates that the inquiry for diversity is *citizenship*, not residence. As the panel explained,

In federal law citizenship means domicile, not residence. *Gilbert v. David*, 235 U.S. 561 (1915). The jurisdictional statutes, the Rules of Civil Procedure, this court's rules, and the instructions at oral argument all required counsel to identify the “citizenship” of the partners. We have been told by authority we are powerless to question that when the parties allege residence but not citizenship, the only proper step is to dismiss the litigation for want of jurisdiction.⁵

Practitioners should thus use the terms “citizenship” or “domicile” for purposes of diversity, and avoid the terms “resident” and “residence.”

Determining a corporation's principal place of business is also a recurring issue. In *Chamberlain Mfg. v. Maremont Corp.*,⁶ an Illinois plaintiff sued Indiana-based Arvin Industries and its subsidiary, Maremont. Defendants moved to dismiss asserting diversity was lacking due to Maremont's status as an Illinois citizen.

The court denied the motion in a thorough opinion. Judge Alesia first confirmed that the “nerve center” test applies in the Seventh Circuit to determine

partnership, the [jurisdictional] statement shall identify the citizenship of all members.”).

4. *America's Best Inns*, 980 F.2d at 1074.

5. *Id.* (citing *Steigleder v. McQuesten*, 198 U.S. 141 (1905); *Denny v. Pironi*, 141 U.S. 121 (1891); *Robertson v. Cease*, 97 U.S. 646 (1878)).

6. 828 F. Supp. 589 (N.D. Ill. 1993).

a corporation's principal place of business.⁷ The dispute centered on what factors should be considered in determining a corporation's nerve center.

Judge Alesia noted that the Seventh Circuit has not precisely delineated what factors should be addressed. In fashioning a standard, Judge Alesia nonetheless found guidance in the *Wisconsin Knife* decision, where the Seventh Circuit stated that “[j]urisdiction ought to be readily determinable.”⁸ He thus rejected more detailed tests such as the “locus of the operations of the corporation” test. Judge Alesia wrote:

Wisconsin Knife indicates that the court should look for the corporation's brain and will ordinarily find it where the corporation has its headquarters. *Wisconsin Knife*, 781 F.2d at 1282. Hence, this court concludes that any factors involving, to continue the metaphor, any part of the body other than the brain are irrelevant to this test. Accordingly, . . . only the factors which deal with the brains of the organization should be considered for the 'nerve center' test and factors dealing with 'day-to-day operating responsibilities' . . . should be disregarded.⁹

Applying this standard, the court held that even though Maremont's operations are concentrated in Illinois, its “brain” is in Indiana. Specifically, Maremont's directors, 70% of its officers, its CEO, CFO, Treasurer, Secretary, and General Counsel all worked and resided in Indiana. Further, major corporate decisions were undertaken and signed in Indiana. Finally, all of Maremont's bank accounts were funded by Arvin, and its cash receipts were commingled with Arvin's at the end of each business day. With its nerve center in Indiana, diversity was thus present, and the motion to dismiss was denied.¹⁰

Several other diversity issues were addressed during the survey period, but are merely highlighted below so that practitioners are aware of these developments:

(1) The Seventh Circuit held that a non-diverse insurer with partial subrogation rights can be dismissed as a dispensable party without destroying diversity.¹¹

(2) Although the Seventh Circuit now recognizes the doctrine of fraudulent joinder,¹² the Northern District of Illinois held that the

7. *Id.* at 590 (citing *Wisconsin Knife Works v. National Metal Crafters*, 781 F.2d 1280, 1282 (7th Cir. 1986)).

8. *Chamberlain Mfg.*, 828 F. Supp. 591 (citing *Wisconsin Knife*, 781 F.2d at 1282).

9. 828 F. Supp. at 592.

10. *Id.* at 592-94.

11. *Krueger v. Cartwright*, 996 F.2d 928 (7th Cir. 1993).

12. *Poulos v. Naas Foods*, 959 F.2d 69 (7th Cir. 1992).

doctrine did not apply where there was a "reasonable possibility" that the allegedly fraudulently joined defendant could be held liable.¹³

(3) An action was dismissed for want of diversity where the corporate plaintiff's complaint failed to list the plaintiff's principal place of business.¹⁴

B. Amount-in-Controversy Requirement

Several decisions addressed the diversity jurisdiction amount-in-controversy requirement that the matter exceed the sum or value of \$50,000.¹⁵ In *Oder v. Buckeye State Mutual Ins.*,¹⁶ plaintiffs sued for unspecified damages in an Indiana state court. Defendant removed the action. Plaintiffs then moved to remand, asserting that the amount in controversy did not exceed \$50,000. With their motion, plaintiffs even represented that they did not seek a recovery exceeding \$50,000. Based on this certification, the court remanded the action to state court.

Although *Oder* has logical appeal, the Seventh Circuit issued an opinion in 1993 that effectively supersedes the *Oder* holding. In *In re Shell Oil Co.*,¹⁷ the Seventh Circuit held that it is improper to remand removed cases in which the plaintiff files a post-removal stipulation to seek no more than \$50,000. According to the Seventh Circuit, the time for determining jurisdiction is the time of removal, thus making any subsequent attempt to destroy jurisdiction of no avail.

A subsequent opinion from the Seventh Circuit further shows that *Oder* is no longer good law. In *Shaw v. Dow Brands*,¹⁸ a consumer sued Dow Brands for unspecified damages due to personal injury. Dow removed the case, stating in its petition for removal that the amount in controversy exceeded \$50,000. On appeal of subsequent rulings on the merits, plaintiff argued that the amount at issue did not exceed \$50,000.

The Seventh Circuit found jurisdiction present, holding that in removed cases the amount in controversy is satisfied if the defendant "can show to a reasonable probability that more than \$50,000 is in controversy."¹⁹ Because the plaintiff did not contest jurisdiction at the time of removal or in its opening brief in the Seventh Circuit, but only raised the issue after prompted by the Seventh Circuit,

13. *County of Cook v. Mellon Stuart Co.*, 812 F. Supp. 793 (N.D. Ill. 1992).

14. *First Access of Northern Illinois, Inc. v. TKX Leasing*, 812 F. Supp. 863 (N.D. Ill. 1993).

15. 28 U.S.C. § 1332(a) (1988).

16. 817 F. Supp. 1413 (S.D. Ind. 1992).

17. 970 F.2d 355 (7th Cir. 1992).

18. 994 F.2d 364 (7th Cir. 1993).

19. *Id.* at 367 n.2.

the court held that plaintiff had admitted jurisdiction. Despite a vigorous dissent on this issue, rehearing and rehearing en banc were denied.²⁰

As discussed at length in last year's article,²¹ these amount-in-controversy issues frequently arise because of state procedural rules prohibiting personal injury plaintiffs from pleading specific dollar amounts in state court.²² Even after *Shaw* there are no clear guidelines for removing defendants in such cases. All that is certain is that plaintiffs cannot certify away jurisdiction after removal,²³ and that jurisdiction exists where plaintiffs do not contest removal and state in an appellate brief that the amount at issue exceeds \$50,000. How, then, do removing defendants ensure that the action stays in federal court?

As suggested by this author in last year's article, defendants should include specific allegations and supporting documents (if feasible) in the removal petition to demonstrate the amount at issue, and should consider serving an interrogatory on plaintiffs regarding the scope of claimed damages.²⁴ The *Shaw* panel further suggested that such an interrogatory be served during the state-court action as well.²⁵ One risk of this option, however, is that state-court-minded plaintiffs could effectively preclude removal by responding that damages of \$50,000 or less are sought. Indeed, there is nothing in Indiana's Trial Rule 8(A)(2) prohibiting state-court plaintiffs from doing this in the first place in their state complaint (except the likely inability to later recover more than that amount in state court).²⁶

Finally, in *Gould v. Airtisoft, Inc.*,²⁷ the Seventh Circuit addressed diversity jurisdiction in a declaratory judgment and injunctive relief action, which can often cause problems in determining the amount in controversy. The case involved a former high-ranking employee's suit to compel payment of a bonus in the form of privately held company stock. After noting that the Seventh Circuit has "struggled before with the problem of determining the actual amount in controversy when plaintiffs request only declaratory or equitable relief,"²⁸ the court held "that the shares of stock themselves are at issue and that the amount in controversy therefore depends on the value of those shares."²⁹

20. *Id.* at 364.

21. John R. Maley, *1992 Federal Practice and Procedure Update for Seventh Circuit Practitioners*, 26 IND. L. REV. 817, 819-23 (1993) [hereinafter *1992 Federal Practice*].

22. *See, e.g.*, IND. TRIAL R. 8(A)(2). *See also* *Oder v. Buckeye State Mut. Ins.*, 817 F. Supp. 1413, 1414 (S.D. Ind. 1992) (noting same).

23. *In re Shell Oil Co.*, 970 F.2d 355, 356 (7th Cir. 1992).

24. *1992 Federal Practice*, *supra* note 21, at 823.

25. *Shaw*, 994 F.2d at 367.

26. Trial Rule 8(A)(2) only bars specific dollar prayers; it does not preclude a statement that plaintiff seeks fair and reasonable compensation *not to exceed* \$50,000.

27. 1 F.3d 544 (7th Cir. 1993).

28. *Id.* at 547 (citing *Jadair, Inc. v. Walt Keeler Co.*, 679 F.2d 131, 132 (7th Cir. 1982), *cert. denied*, 459 U.S. 944 (1982); *McCarty v. Amoco Pipeline Co.*, 595 F.2d 389, 391-95 (7th Cir. 1979)).

29. 1 F.3d at 547.

Determining the value of those shares was not easy because the company was privately held but was in the process of going public. Nonetheless, defendant successfully met its burden of proof to show the amount-in-controversy by submitting a draft of the prospectus for the planned public offering. By the terms of the prospectus, plaintiff's shares would have had an expected value ranging from \$115,000 to \$135,000. Even though this estimate was speculative, plaintiff offered nothing to the contrary, so the court was satisfied that the amount at issue exceeded \$50,000.³⁰

Again, the lesson is that parties advancing or resisting diversity jurisdiction should seriously consider and evaluate the amount-in-controversy requirement, and should support their arguments with evidence.

C. Supplemental Jurisdiction

The former doctrines of pendent and pendent-party jurisdiction are now codified at 28 U.S.C. § 1367, and are known as supplemental jurisdiction.³¹ Although few reported decisions have addressed this subject in much detail since the creation of supplemental jurisdiction in 1990, several key holdings on the subject were issued during the survey period.

In *Bonilla v. City Council of City of Chicago*,³² the court addressed whether a state-law claim was covered by supplemental jurisdiction. In *Bonilla*, a group of Hispanic voters from Chicago sued the Chicago City Council and others over the mapping of aldermen districts. Two of plaintiffs' claims raised federal questions under the Voting Rights Act and the U.S. Constitution, challenging the validity of the re-mapping and the process used therein. Plaintiffs also raised state-law claims challenging the city clerk's failure to certify vacancies in two aldermen wards.

The court dismissed the state-law claim, finding that it did not fall within the court's supplemental jurisdiction under 28 U.S.C. § 1367(a), which allows jurisdiction over all non-federal claims "that are so related to claims in the action within such original jurisdiction that they form part of the same case or controversy under Article III of the United States Constitution."³³ The court further defined this standard, explaining that claims are part of the same case or controversy "if they 'derive from a common nucleus of operative fact' such that a plaintiff 'would ordinarily be expected to try them all in one judicial proceeding.'"³⁴

30. *Id.* at 547-48.

31. See John R. Maley, 1990 *Federal Practice and Procedure Update for the Seventh - Circuit Practitioner*, 24 IND. L. REV. 632, 641-46 (1991) (discussing supplemental jurisdiction at length).

32. 809 F. Supp. 590 (N.D. Ill. 1992).

33. 28 U.S.C. § 1367(a) (1990).

34. *Bonilla*, 809 F. Supp. at 599 (quoting *United Mine Workers v. Gibbs*, 383 U.S. 715, 725 (1966)).

Applying this language, the court found that the state-law claim over vacancies in two wards and the federal re-mapping claims did not derive from a common nucleus of operative facts. The court thus lacked supplemental jurisdiction and dismissed the state-law claim.³⁵ Furthermore, the court held that even if supplemental jurisdiction existed, it would decline to exercise such jurisdiction under 28 U.S.C. § 1367(c)(1), which allows courts to dismiss supplemental claims that raise “a novel or complex issue of State law.”

The Seventh Circuit issued seemingly conflicting opinions on another aspect of supplemental jurisdiction. Under 28 U.S.C. § 1367(c)(3), a district court “may decline to exercise supplemental jurisdiction over a [supplemental claim] if . . . the district court has dismissed all claims over which it has original jurisdiction.” One Seventh Circuit decision accords district courts broad discretion here, while another virtually removes any discretion.

In the first case, *Wentzka v. Gellman*,³⁶ plaintiffs sued their investment broker for federal securities law violations and related state-law claims. The federal claims were dismissed by the district court in March of 1991, but the state-law claims remained pending. In January of 1992, the district court reached the merits of the state-law claims, and entered summary judgment for the broker.

On appeal, both parties focused on the merits, but the Seventh Circuit turned to jurisdiction. In a decision by Judge Leinenweber from the Northern District of Illinois joined by Judges Ripple and Kanne, the Seventh Circuit held that the district court abused its discretion by retaining the supplemental claim after dismissal of the federal claims.

The *Wentzka* panel relied on prior Seventh Circuit decisions addressing the same issue under pendent jurisdiction.³⁷ “In these cases,” the panel explained, “we said quite clearly that, where a federal claim drops out before trial, a district court should not retain the state claims absent extraordinary circumstances.”³⁸ The panel then identified two such extraordinary exceptions: (1) where the state-law claim invokes a federal defense (e.g., preemption); or (2) where the statute of limitations has run on the state-law claim. Because neither was present in *Wentzka*, and because the state law at issue was unsettled, the panel vacated summary judgment and ordered the state-law claim dismissed without prejudice.

In *Brazinski v. Amoco Petroleum Additives*,³⁹ by contrast, the Seventh Circuit apparently held that supplemental claims can be retained after dismissal of federal claims, even absent extraordinary circumstances as required by

35. *Bonilla*, 809 F. Supp. at 599.

36. 991 F.2d 423 (7th Cir. 1993).

37. *Wentzka*, 991 F.2d at 425 (citing *Manor Healthcare Corp. v. Guzzo*, 894 F.2d 919, 922 (7th Cir. 1990); *Blau Plumbing, Inc. v. S.O.S. Fix-It, Inc.*, 781 F.2d 604, 611 (7th Cir. 1986); *Bernstein v. Lind Waldock & Co.*, 738 F.2d 179, 186-88 (7th Cir. 1984)).

38. *Wentzka*, 991 F.2d at 425.

39. 6 F.3d 1176 (7th Cir. 1993).

Wentzka. In *Brazinski* a panel of the Seventh Circuit found supplemental jurisdiction present even though the federal claims had been dismissed. Judge Posner, joined by Judges Flaum and Kanne (who was on the *Wentzka* panel), observed that prior to the supplemental jurisdiction statute,

it was the practice for district judges in the exercise of their discretion to relinquish a pendent claim or suit if the main claim was dismissed before trial . . . but to retain the pendent claim if the claim conferring federal jurisdiction was dismissed after the case had been tried, in order to save the parties the expense of having to try the pendent claim twice.⁴⁰

"The new statute," Judge Posner wrote, "surely did not change this practice merely by providing that the district judge 'may' relinquish supplemental jurisdiction if the main claim is dismissed, 28 U.S.C. § 1367(c)(3), without expressly qualifying this permission by excluding from its scope cases in which that claim is dismissed after the case had been tried."⁴¹

According to Judge Posner, however, this practice was not inflexible. "[T]here was no rule that if the main claim had not been tried, the pendent claim must be dismissed, and if it had been tried, the pendent claim must be retained, these were at most presumptions."⁴² Judge Posner then appeared to subtly question *Wentzka*, writing that "*Wentzka* . . . contains some strong language about how narrow this principle is" "But," he added, "as it was a case where the state law was unsettled, it did not really test the outer bounds of the principle." Finally, Judge Posner noted that "the statute says the court 'may' relinquish its supplemental jurisdiction if various conditions such as the dismissal of all the claims within the court's original jurisdiction are satisfied, not that it must always do so."⁴³

The contrast between *Wentzka* and *Brazinski* is both dramatic and problematic. The former holds that, absent narrow extraordinary circumstances, supplemental claims must be relinquished after dismissal of federal claims. The latter states instead that dismissing supplemental claims is discretionary, as the language of the statute suggests.

Although the reasoning of *Brazinski* is more persuasive because it does justice to the permissive statutory language, lower courts cannot lightly cast aside the *Wentzka* reversal. To the contrary, until the apparent conflict is resolved, lower courts are likely to and should probably follow the more restrictive holding of *Wentzka*.

40. *Id.* at 1182.

41. *Id.*

42. *Id.*

43. *Id.*

II. REMOVAL

A common question in multi-defendant cases is whether all defendants must join in the removal notice, and if so, when the notice is due. It can be difficult to accomplish such a feat in thirty days, particularly when the various defendants are served at different times. For instance, if defendant A is served on January 1 and defendant B is served on January 29, is the removal notice still due on January 31, and must it be signed by both defendants? Several decisions during the survey period address but do not resolve these issues.

Some background from the removal statute is necessary. Under 28 U.S.C. § 1446(a), a “defendant or defendants desiring to remove any civil action . . . shall file in the district court . . . a notice of removal signed pursuant to Rule 11” Under § 1446(b), the notice shall be filed “within thirty days after the receipt by the defendant, through service or otherwise, of a copy of the initial pleading” If the initial state-court complaint does not reveal a basis for removal, a notice of removal may be filed “within thirty days after receipt by the defendant, through service or otherwise, of a copy of an amended pleading, motion, order or other paper from which it may first be ascertained that the case is one which is or has become removable.”⁴⁴ However, diversity claims may not be removed more than one year after the commencement of the state-court action.⁴⁵ Unfortunately the statute does not provide more specific guidance on multiple-defendant removals.

The first question in multi-defendant cases is whether all defendants must join in removal. With several established exceptions, all defendants must join in the petition. This was confirmed during 1993 in *Shaw v. Dow Brands*,⁴⁶ *Siderits v. State of Indiana*,⁴⁷ and *Production Stamping Corp. v. Maryland Casualty Co.*⁴⁸ The exceptions are: (1) when the co-defendant has not been served;⁴⁹ (2) when the co-defendant is a nominal party;⁵⁰ (3) when the co-defendant is fraudulently joined;⁵¹ or (4) when there is a “separate and independent” claim under 28 U.S.C. § 1441(c).⁵²

The second issue is whether all defendants who must join in removal must actually *sign* the removal notice. Courts across the country treat this different-

44. 28 U.S.C. § 1446(b) (1990).

45. *Id.*

46. 994 F.2d 364, 368 (7th Cir. 1993) (“A [removal notice] is considered defective if it fails to explain why the other defendants have not consented to removal.”).

47. 830 F. Supp. 1156, 1159 (N.D. Ind. 1993) (“[A]ll defendants must join in the removal petition.”) (per Judge Miller).

48. 829 F. Supp. 1075, 1076 (E.D. Wis. 1993) (“As a general rule, all defendants must join in a removal petition in order to effect removal.”).

49. *Shaw*, 994 F.2d at 369; *Siderits*, 830 F. Supp. at 1159.

50. *Shaw*, 994 F.2d at 369; *Siderits*, 830 F. Supp. at 1159.

51. *Siderits*, 830 F. Supp. at 1160.

52. *Id.*

ly,⁵³ and the issue is still unclear in the Seventh Circuit. In *Shaw* the Seventh Circuit excused a defendant's failure to explain why other defendants had not consented to removal, but did so only because the co-defendants either had not been served or were nominal parties.⁵⁴ Neither *Shaw* nor any other Seventh Circuit decision specifically addresses whether signature is required by each defendant.

Two district court opinions within the Circuit, however, cause concern. In *Mechanical Rubber & Supply v. American Saw and Mfg.*,⁵⁵ the Central District of Illinois held several years ago that it was sufficient for the removing defendant to state that the co-defendant joined in removal. However, the court added that absent the co-defendant's signature, the removing defendant "should be required to obtain an affidavit from [the co-defendant] stating that it joined in [removal] at that time."⁵⁶ More than mere recitation of consent is thus required in the Central District of Illinois.

Worse yet, in *Production Stamping*,⁵⁷ the Eastern District of Wisconsin recently held that signature of all defendants is required. As typically occurs, the removing defendant had merely recited in the notice of removal signed under obligations of Rule 11 that the co-defendant consented to removal. This was insufficient for Judge Randa, who interpreted the majority view to require separate signatures. Apparently distrustful of counsel's representation, Judge Randa reasoned that by "requiring each defendant to formally and explicitly consent to removal, one defendant is prevented from choosing a forum for all."⁵⁸ Judge Randa added, "Requiring an independent statement of consent from each defendant ensures that the Court has a clear and unequivocal basis for subject matter jurisdiction before taking the serious step of wresting jurisdiction from another sovereign."⁵⁹

In this era of purported civil justice reform aimed at making litigation less cumbersome and less expensive, this holding is unfortunate. Requiring every served defendant to sign the removal petition—or otherwise make some separate filing to join in removal—will add nothing but expense and additional paper to federal litigation. Furthermore, the holding implicitly assumes that representations by counsel made under Rule 11 cannot be accepted as true. This is truly unprecedented, and indeed is contrary to the assumption of honesty implicit in

53. Compare *Knickerbocker v. Chrysler Corp.*, 728 F. Supp. 460, 461-62 (E.D. Mich. 1990) (each defendant must communicate his consent by an "official filing or voicing of consent"), with *Jasper v. Wal-Mart Stores*, 732 F. Supp. 104, 105 (M.D. Fla. 1990) (notice must be signed "or the signer must allege consent of all defendants.").

54. *Shaw*, 994 F.2d at 368-69.

55. 810 F. Supp. 986 (C.D. Ill. 1990).

56. *Id.* at 990.

57. 829 F. Supp. 1074 (E.D. Wis. 1993).

58. *Id.* at 1076.

59. *Id.* at 1077.

other facets of federal procedure.⁶⁰ Moreover, if co-defendants have not, in fact, consented to removal, certainly they can object accordingly.

In addition, as a matter of statutory construction—which is what should govern the inquiry—nothing in the language of the removal statute compels such a requirement. The statute says merely that a “defendant or defendants . . . shall file . . . a notice of removal signed pursuant to Rule 11”⁶¹ A reasonable interpretation of this language would be that a single notice can be filed, and that it need not be signed by all defendants. Had Congress intended otherwise, it could have easily said so by adding language such as “signed by all defendants.” Indeed, in the context of stipulations of dismissals, Rule 41(a)(1)(ii) uses such language by requiring such stipulations to be signed “by all parties”⁶²

Until the Seventh Circuit addresses this issue head-on, which is not likely to occur any time soon given the general non-reviewability of remand orders,⁶³ practitioners should be extremely cautious in this area. The *Production Stamping* and *Mechanical Rubber* decisions, although not binding on Indiana’s federal judiciary, are nonetheless on the books and potentially persuasive.⁶⁴ It is thus recommended that removing counsel attempt to secure the signature of all served co-defendants on removal notices whenever possible.

If logistics and time constraints simply preclude this, counsel should at least specifically recite that consent was obtained from each co-defendant (giving specifics such as date, time, and name of consenting attorney), preferably attaching an affidavit or letter to that effect from co-defense counsel. Further, removing counsel should also ensure that co-defendants file something—perhaps simply titled a “Notice of Consent to Removal”—indicating that *prior to removal* the co-defendant gave consent to removal.

As this Article went to press Judge McKinney addressed this issue in *Mutual Security Life Insurance v. Fail*.⁶⁵ Judge McKinney rejected *Production Stamping* and followed *Mechanical Rubber*, and thus denied remand where removal petition recited all defendants’ consent, and where all non-signing defendants thereafter filed papers with the court within thirty days of service indicating their consent to removal.

The third and final removal problem is whether the thirty day removal period is renewed by the subsequent service of additional co-defendants, another issue that has not been addressed by the Seventh Circuit. In *Scialo v. Scala Packing Co.*,⁶⁶ the Northern District of Illinois answered no, holding that there

60. See, e.g., FED. R. CIV. P. 65(b) (allowing counsel to make ex parte representations to court for temporary restraining orders).

61. 28 U.S.C. § 1446(a) (1990).

62. FED. R. CIV. P. 41(a)(1)(ii).

63. 28 U.S.C. § 1447(d) (1990); *In re Shell Oil*, 966 F.2d 1130, 1132 (7th Cir. 1992).

64. See *Cortright v. Thompson*, 812 F. Supp. 772, 776 (N.D. Ill. 1992) (decisions of other district judges have persuasive rather than authoritative effect).

65. No. IP94-I-C, slip op. (S.D. Ind. Apr. 20, 1994).

66. 821 F. Supp. 1276 (N.D. Ill. 1993).

is a single date of removal that starts with service upon the first defendant. In *Scialo* the first defendant served in the action filed a timely removal notice. The action was remanded, however, because not all served defendants joined in the removal. Later, indeed more than thirty days after the first defendant attempted removal, a previously unserved defendant was properly served and filed a notice of removal. The next day the other defendants (including those who had initially sought removal) joined by filing an amended notice of removal.

Judge Shadur remanded the action again, however, reasoning that there is a single date of removal. He explained, "By far the majority of courts that have dealt with the timeliness issue have adopted the single-date-of-removal rule, with Section 1446(b)'s thirty day time clock beginning to run with service on the *first* defendant entitled to remove."⁶⁷ Relying on this rule, Judge Shadur held that the time for removal had long since passed. Indeed, under 28 U.S.C. § 1447(c) he went so far as to require the removing defendant to pay the plaintiff's costs and fees in opposing removal.⁶⁸

Practitioners should obviously be leery of *Scialo*, and should carefully consider any removals attempted more than thirty days after the first defendant was served. Judge Shadur does not cite any authority contrary to his holding, so counsel attempting such removals should conduct up-to-date research to find support for "tardy" removals.

Scialo does not close the door on all subsequent removals. As Judge Shadur acknowledged, there is authority from the Fourth Circuit that each defendant has 30 days from the date they were served to join an otherwise timely and valid removal notice. Specifically, in *McKinney v. Bd. of Trustees of Maryland Community College*,⁶⁹ the court held that when a removal notice is filed within thirty days of service on the first defendant, subsequently served defendants have thirty days from their date of service to join in removal. Presumably this would be done by filing a separate notice in compliance with § 1446.

Thus, when served with a removable state-court complaint, defense counsel should *immediately* ascertain whether and when every other defendant was served. Under *Scialo* and *McKinney*, the most important date for removal is the date that service was first effected on any defendant. To be safe, any removal notice must be filed within thirty days of such service. Thereafter, any individual defendant can join in removal within thirty days from the date any such defendant was served.

67. *Id.* at 1277 (citing *Martin Pet Products v. Lawrence*, 814 F. Supp. 56 (D. Kan. 1993), and *Getty Oil Corp. v. Insurance Co. of North America*, 841 F.2d 1254, 1262-63 (5th Cir. 1988)).

68. 821 F. Supp. at 1278. Judge Shadur held that good faith is not relevant in the inquiry under § 1447(c) for costs and fees. It is true that § 1447(c) does not include such a standard. Other case law, however, holds that costs are generally inappropriate if there were legitimate and substantial grounds for removal and they were asserted in good faith. *E.g.*, *Wisconsin v. Missionaries to the Preborn*, 798 F. Supp. 542, 544 (E.D. Wis. 1992).

69. 955 F.2d 924, 926-28 (4th Cir. 1992).

III. SERVICE OF PROCESS

Drastic changes to service of process took effect December 1, 1993, with a nearly total revision to Rule 4.⁷⁰ Although this Article outlines the highlights, practitioners are advised to study the new text of Rule 4 (as well as all other rule changes included in the December 1, 1993, amendments). Thirty different rules are amended, with 13 of the amendments being quite significant.⁷¹

The most significant change to Rule 4 is the creation of a new method by which service of process can be avoided by use of notice and waiver of service. Rule 4(d) allows for plaintiffs to issue a notice and request for waiver of service to non-governmental defendants upon filing an action.⁷² The notice, an official sample of which is provided at Form 1A to the Rules, basically notifies the defendant of the existence of the suit and requests the defendant to waive the formalities of service.

If such notice is issued in compliance with the technical requirements of Rule 4(d), defendants have a "duty to avoid unnecessary costs of serving . . . summons."⁷³ If a domestic defendant fails to comply with a request to waive service, "the court *shall* impose the costs subsequently incurred in effecting service on the defendant unless good cause for the failure be shown."⁷⁴ Such costs include the costs and fees of bringing any motion to collect the costs of subsequent service.⁷⁵ This is one reason for defendants to timely return requests for waivers of service within the standard thirty-day period.⁷⁶

Another reason to accept and return waivers is Rule 4(d)(3)'s provision allowing sixty days to answer from the date the notice was sent. With answers otherwise initially due twenty days from service of summons,⁷⁷ defendants should find the additional time attractive. Finally, executing a waiver of service does not waive jurisdictional or venue defenses.⁷⁸

Significantly, notice and waiver of service are *optional* for plaintiffs.⁷⁹ If this voluntary procedure is not used, or if it is used but not returned by a

70. FED. R. CIV. P. 4 (1993).

71. FED. R. CIV. P. 4, 11, 12, 16, 26, 30, 32, 33, 34, 36, 37, 54, and 58 include major changes.

72. FED. R. CIV. P. 4(d)(2).

73. *Id.*

74. *Id.* (emphasis added).

75. FED. R. CIV. P. 4(d)(5).

76. FED. R. CIV. P. 4(d)(2)(F). This subsection states that the notice and request for waiver must allow the defendant a "reasonable time to return the waiver, which shall be at least 30 days from the date on which the request is sent, or 60 days from that date [for foreign defendants]."

77. FED. R. CIV. P. 12(a).

78. FED. R. CIV. P. 4(d)(1).

79. *Id.* ("To avoid costs, the plaintiff *may* notify such a defendant of the commencement of the action . . .") (emphasis added).

defendant, service of process proceeds in basically the same fashion as before the amendments.⁸⁰

As for whether plaintiffs should utilize this new procedure, this author's advice is that notice and waiver are beneficial in only one instance, which potentially involves significant expense in effecting service. When a defendant is expected to be evasive, it might be necessary to eventually utilize the relatively expensive method of personal service. If notice and waiver were initially used, an evasive defendant must pay such costs if and when eventually served. The only downside with evasive defendants is that the notice could simply alert the defendant of the need to flee. Although no reported case has yet addressed the issue, nothing in the amended rule suggests that unsuccessfully issuing a notice and waiver is constitutionally sufficient—without later service of process—to uphold a judgment against such an absentee defendant. Separately, the following decisions serve as reminders that Rule 4(m)'s 120-day limit on effecting service of process is taken seriously in this Circuit:⁸¹

(1) In *Robbins v. Brady*,⁸² plaintiff's action was dismissed for failure to effect service on the federal government within 120 days. The failure was due to a paralegal's misunderstanding of the service requirements. The court held this is not good cause, reasoning that it is the duty of counsel to ensure service is effected.

(2) In *Serlin v. Arthur Andersen & Co.*,⁸³ the court dismissed plaintiff's action for untimely service, even though service was only 18 days late, and even though the dismissal would effectively preclude a subsequent action.

(3) In *Bachenski v. Malnati*,⁸⁴ plaintiff's claims against a defendant were similarly dismissed for failure to serve within 120 days. Judge Shadur noted that plaintiff "voluntarily chose this attorney as his representative in the action, and he cannot now avoid the consequences of the acts or omissions of this freely selected agent."⁸⁵

80. FED. R. CIV. P. 4(e), (f), & (h).

81. Former Rule 4(j)'s 120-day limit has been re-codified at Rule 4(m), with only modest substantive amendments making it clear that for good cause shown the court can extend the deadline.

82. 149 F.R.D. 154 (C.D. Ill. 1993).

83. 145 F.R.D. 494 (N.D. Ill. 1993).

84. 809 F. Supp. 610 (N.D. Ill. 1993).

85. 809 F. Supp. at 614 (quoting *Link v. Wabash R.R.*, 370 U.S. 626, 633-34 (1962)).

IV. DISCOVERY

A. *Amended Discovery Rules*

Sweeping changes to discovery also took effect December 1, 1993, with amendments to Rules 26, 30, 32, 33, 34, 36, and 37. Key amendments are analyzed below.

Rule 26(a) is drastically rewritten to require early disclosure of certain core information such as witnesses, documents, and damage computations.⁸⁶ It also requires extensive pre-trial disclosures for testifying experts.⁸⁷ Before addressing the burdens of Rule 26(a), the first question is whether these new requirements can be avoided. Fortunately, in most cases they can be.

1. *How To Avoid Mandatory Disclosure.*—The preamble to Rule 26(a)(1) provides, “Except to the extent *otherwise stipulated or directed by court or local rule*, a party shall, without awaiting a discovery request, provide to the other parties [certain specified core information]”⁸⁸ Because of this proviso, in all districts counsel can try to stipulate away the burdensome initial disclosure requirements of Rule 26(a)(1). Where stipulation is not possible, practitioners have two other options.

First, some districts have enacted new local rules to opt out of Rule 26(a)’s requirements, and others may follow suit. Significantly, on December 17, 1993, the Southern District of Indiana passed two emergency interim local rules to partially opt out of Rule 26(a). Under new Local Rules 26.3 and 16.1(d)(3), the initial disclosure requirements of Rule 26(a)(1) do *not* apply in the Southern District.⁸⁹ The pre-trial expert disclosure requirements of Rule 26(a)(2)(B), however, *do* apply, although in preparing case management plans parties are required to consider whether the expert disclosure provisions should be varied by stipulation.⁹⁰

To date, the Northern District of Indiana has not passed a similar opt-out rule. Furthermore, according to reports from court staff, no such proposal is being considered. In other districts outside Indiana where counsel may be litigating, practitioners should contact the court to ascertain any such local rules developments in this area.

Second, in districts where the local rules are of no assistance and where stipulations are not reached with opposing counsel, practitioners should consider seeking relief from the court. The federal bench and bar were not universally supportive of the Rule 26(a) changes, and many judges will likely want to do things their own way (as many have done, particularly since the Civil Justice

86. FED. R. CIV. P. 26(a)(1) (1993).

87. FED. R. CIV. P. 26(a)(2) (1993).

88. FED. R. CIV. P. 26(a)(1) (emphasis added).

89. S.D. IND. L.R. 26.3, 16.1(d)(3).

90. S.D. IND. L.R. 16.1(d)(3).

Reform plans were implemented). The best opportunity to avoid mandatory disclosure in Rule 26(a) districts is probably through early and amicable discussions with counsel. Should that fail, court intervention could be advisable depending on the case and the scope of mandatory discovery that would otherwise take place.

Another consideration is whether amended Rule 26(a) even applies to cases pre-dating December 1, 1993. Under the Supreme Court's order transmitting the rules to Congress, the amendments are effective on December 1, 1993, for all new cases and, "insofar as just and practicable," for all pending cases.⁹¹ This standard necessarily invokes a case-by-case, rule-by-rule analysis.

Prior case law interpreting this language after the 1991 amendments indicates, however, that amended rules should be given retroactive application to the "maximum extent possible."⁹² It is this writer's opinion that where a scheduling order or case management plan was already in place, it would not be "just and practicable" to impose the additional burdens of Rule 26(a). On the other hand, where no such order or plan was in place, it would seem appropriate for Rule 26(a) to apply. In either case, counsel might want to confirm the status of their case with opposing counsel by stipulation.

2. *Rule 26(a) Requirements.*—When Rule 26(a) does apply (indeed, there may be instances when it is advantageous to use), there are three primary components to address. First, until mandatory disclosure occurs, no other discovery is allowed without leave of court or stipulation.⁹³ Despite the Rule's professed purpose of expediting litigation,⁹⁴ this will likely lead to delays because automatic disclosure is not required for nearly four months after service of the complaint.

Second, mandatory disclosure of certain core information must occur within 10 days of a mandatory meeting of counsel required by amended Rule 26(f).⁹⁵ That mandatory meeting must occur no later than 106 days after service of the complaint (this time period is ascertainable only by tracing three different rules: 16(b), 26(b), and 26(f)). Thus, disclosure must take place, essentially, within four months (116 days) of service.

The third aspect is the scope of the mandatory disclosures, which is the real problem with the new rule. The information to be disclosed includes individuals "likely to have discoverable information relevant to disputed facts alleged with particularity in the pleadings."⁹⁶ This vague standard will undoubtedly cause

91. Letter of Transmittal from Chief Justice Rehnquist to Speaker Thomas S. Foley (April 22, 1993) (copy on file with author).

92. *Burt v. Ware*, 14 F.3d 256, 1994 WL 28026 (5th Cir. 1994); *accord*, *Diaz v. Shallbetter*, 984 F.2d 850, 852 (7th Cir. 1993) ("just and practicable" language "ordinarily" requires application of new rules to pending cases).

93. FED. R. CIV. P. 26(a).

94. Advisory Committee Notes to FED. R. CIV. P. 26(a).

95. FED. R. CIV. P. 26(a).

96. FED. R. CIV. P. 26(a)(1)(A).

problems. Similarly, parties must disclose “all documents . . . and tangible things . . . that are relevant to disputed facts alleged with particularity in the pleadings.”⁹⁷ Again, this standard is similarly vague, and will also cause difficulties.

Although not immediately apparent from the rule, a literal reading of the text indicates that when a pleading (e.g., the Complaint) alleges a fact with particularity, the defendant *and* plaintiff must disclose the required witnesses and documents. This is so because the rule says “parties” must disclose such information when facts are alleged with particularity in the “pleadings.”⁹⁸ There is no express limitation to opposing parties. Thus, parties drafting pleadings (whether a Complaint or Answer) should consider not only the potential advantages of pleading with particularity (e.g., obtaining information automatically from the opponent), but also the potential burden of self-imposed automatic disclosure.

For plaintiffs who are willing to disclose their own witnesses and documents, the best advice is to allege all facts with great particularity. This will require the defendant to wrestle with the standard, and where the allegation is disputed to *at least* disclose witnesses and documents that the defendant will use. For defendants willing to disclose their own witnesses and documents in exchange for the plaintiff’s, the Answer can also allege facts with particularity to invoke mandatory disclosure. Most defendants, however, will no doubt prefer to avoid such mandatory disclosure, and will tend not to allege facts with particularity.

Given the vagaries of Rule 26(a), even when mandatory disclosure applies parties are well advised to propound their own specific interrogatories and document requests. There is potentially great leeway in terms such as “likely to have discoverable information,” “disputed facts,” and “alleged with particularity.”

Practitioners should not risk overlooking key documents or witnesses in reliance on mandatory disclosure.

Rule 26(a) also requires an initial computation of damages and production of supporting documents at the time of mandatory disclosure.⁹⁹ For complex commercial cases where damages often are not known until shortly before trial, this requirement will likely be unworkable, and will require substantial extensions. Nonetheless, plaintiffs should make preliminary computations and disclosures to avoid forfeiting potential damages.

Finally, Rule 26(a)(2)(B) also requires disclosure of experts along with a written report.¹⁰⁰ Absent court order otherwise, disclosure is required no later than ninety days prior to trial, and must include the expert’s qualifications, list of publications in the last ten years, the compensation, a listing of testimony in other cases in the last four years, and all exhibits to be used to support the

97. FED. R. CIV. P. 26(a)(1)(B).

98. FED. R. CIV. P. 26(a).

99. FED. R. CIV. P. 26(a)(1)(C).

100. FED. R. CIV. P. 26(a)(2).

opinion. This amendment substantially broadens the scope of pre-deposition discovery available from experts. It should lead to increased understanding of an opponent's experts at reduced cost, but will increase cost in preparing your own experts.

As part of the same package of amendments, the discovery rules were also amended to limit parties to twenty-five interrogatories absent stipulation or leave of court,¹⁰¹ and ten depositions absent leave of court.¹⁰² In addition, depositions can now be recorded by audio or audio and video without agreement or leave of court.¹⁰³

Finally, to help deter the occasional hard-ball litigator, Rule 30(d) has new limitations on objections:

Any objection to evidence during a deposition shall be stated concisely and in a non-argumentative and non-suggestive manner. A party may instruct a deponent not to answer only when necessary to preserve a privilege, to enforce a limitation on evidence directed by the court, or to present a motion [for protective order].¹⁰⁴

B. Case Law Highlights

Numerous decisions addressed discovery issues, the most significant of which are merely outlined below:

(1) Where a deponent makes written changes to deposition testimony pursuant to Rule 30(e) that contradict the prior testimony, specific reasons for each change must be given. Those reasons, however, need not be convincing. When a deposition does not include a reason for each change, explanations must be added. The deposition should be reopened only if the changes make the deposition incomplete or useless without further testimony. Where forty-one changes were made to a 500-page transcript covering three days of testimony, reopening was not required.¹⁰⁵

(2) In a highly publicized case from Pennsylvania, a federal judge barred a lawyer from interrupting a deposition to confer with his client.¹⁰⁶

101. FED. R. CIV. P. 33(a).

102. FED. R. CIV. P. 30(a)(2).

103. FED. R. CIV. P. 30(b)(2).

104. FED. R. CIV. P. 30(d).

105. *Hawthorne Partners v. AT&T Technologies*, 831 F. Supp. 1398, 1406-07 (N.D. Ill. 1993).

106. *Hall v. Clifton Precision*, 150 F.R.D. 525 (E.D. Pa. 1993). The *Hall* case is worthy of a quick read for those who confront intrusive counsel in depositions. Although not binding in the Seventh Circuit, the opinion has been widely reported, and is a strong opinion to potentially share with opposing counsel at a deposition to persuade counsel to cease and desist from such tactics.

(3) A judgment creditor may seek discovery from the debtor concerning financial information of the debtor's spouse; such a request is proper under the "very broad" scope of post-judgment discovery.¹⁰⁷

(4) That a party may disbelieve or disagree with the opponent's discovery response is not grounds for an order compelling discovery.¹⁰⁸

(5) When interrogatories are served on a party and that party is dismissed prior to the time for responding to the discovery, no response to the interrogatories is required.¹⁰⁹

(6) In the context of securing medical records from the Indiana Department of Corrections, Judge Foster held that federal courts are not required to comply with Indiana's procedural requirement that a court order be obtained to disclose such documents.¹¹⁰

V. SUMMARY JUDGMENT

The summary judgment trend continued during 1993, with numerous cases disposed of through Rule 56. With the basic standards well settled, the following cases involve interesting sub-issues or contain favorable summary judgment language:

(1) Judge Barker held that although courts have the power to enter summary judgment *sua sponte*, litigants are entitled to notice and an opportunity to present their evidence should they desire.¹¹¹

(2) Where a party fails to respond to summary judgment, it merely admits that no material facts are in dispute, and does not consent to judgment as a matter of law.¹¹² Indeed, granting summary judgment is not available as a sanction for failing to respond to a summary judgment motion.¹¹³

107. *National Union Fire Ins. v. Waeyenberghe*, 148 F.R.D. 256 (N.D. Ind. 1993) (per Judge Pierce).

108. *Gray v. Faulkner*, 148 F.R.D. 220, 223 (N.D. Ind. 1992) (per Judge Pierce).

109. *Ellison v. Runyan*, 147 F.R.D. 186 (S.D. Ind. 1993) (per Judge Foster).

110. *Jackson v. Brinker*, 147 F.R.D. 189 (S.D. Ind. 1993). This is a welcome decision, for previously even counsel for prisoners were unable to obtain their clients' medical packet from the Indiana Department of Corrections without such an order.

111. *Daniels v. Cincinnati Ins.*, 148 F.R.D. 257 (S.D. Ind. 1993).

112. *Glass v. Dachel*, 2 F.3d 733, 739 (7th Cir. 1993).

113. *Tobey v. Extel/JWP, Inc.*, 985 F.2d 330, 332 (7th Cir. 1993).

(3) With only two exceptions, deposition testimony cannot be supplemented by a conflicting affidavit to avoid summary judgment. The first exception is where the subsequent affidavit clarifies ambiguous or confusing testimony. The second exception is for newly discovered evidence.¹¹⁴

(4) Unsworn statements in letters can be contradicted by subsequent sworn testimony to oppose summary judgment. A party cannot, however, create a "genuine issue of fact by submitting an affidavit containing conclusory allegations which contradict plain admissions in prior deposition or otherwise sworn testimony." Thus, where a witness swore under penalties of perjury in a union's annual report that certain facts were true, he could not later refute those facts in a contrary affidavit at summary judgment.¹¹⁵

(5) "Self-serving assertions without factual support in the record will not defeat a motion for summary judgment."¹¹⁶

(6) "Presenting a scintilla of evidence will not suffice to oppose a motion for summary judgment."¹¹⁷

(7) "Mere conclusory assertions, whether made in pleadings or affidavits, are not sufficient to defeat a proper motion for summary judgment."¹¹⁸

(8) "Only factual disputes that might affect the outcome of the suit in light of the substantive law will preclude summary judgment; irrelevant or unnecessary disputes will not."¹¹⁹

(9) "[I]t is clear that entry of summary judgment is mandatory where the requirements of Rule 56 are met."¹²⁰

114. *Slowiak v. Land O'Lakes, Inc.*, 987 F.2d 1293, 1297 (7th Cir. 1993).

115. *Jean v. Dugan*, 814 F. Supp. 1401, 1404-05 (N.D. Ind. 1993) (per Judge Lozano).

116. *McDonnell v. Cournia*, 990 F.2d 963, 969 (7th Cir. 1993).

117. *MacDonald v. Commonwealth Edison Serv. Annuity Fund*, 810 F. Supp. 239, 241 (N.D. Ill. 1993).

118. *Allstate Ins. v. Barnett*, 816 F. Supp. 492, 495 (S.D. Ind. 1993) (per Judge McKinney).

119. *Id.*

120. *Id.*

VI. EXPERTS

Federal courts have struggled in recent years to determine whether an expert's opinion is truly "expert," or whether it is instead junk science that should not be considered at summary judgment or trial. Some courts, following the so-called *Frye*-rule (stemming from a 1923 D.C. Circuit case),¹²¹ have required the opinion to be generally accepted in the expert's field,¹²² while others have simply applied Rule 702 of the Federal Rules of Evidence without requiring general acceptance.¹²³

The Supreme Court resolved the issue on the last day of its 1992 term, and in so doing gave fairly detailed guidance for future disputes on this subject. In *Daubert v. Merrell Dow Pharmaceuticals*,¹²⁴ the Court held that the *Frye* rule of general acceptance is not a prerequisite to admissibility of expert opinion. The Court reasoned that *Frye* predated Rule 702 by half a century, and found no indication in the text of Rule 702 that general acceptance is required.¹²⁵

This is generally considered good news for plaintiffs, whose experts' opinions are sometimes necessarily pursuing the outer edges of existing science and methodology, and as such were subject to inadmissibility if their opinions were not generally accepted by others in the field. There is good news for defendants as well, who typically attempt to limit the outer bounds of expert opinion.

The *Daubert* Court did not stop by casting aside the *Frye* rule. Instead, it wrote that district judges have an affirmative duty to screen expert evidence pursuant to Rules 104(a) and 702. The Court explained, "That the *Frye* test was displaced by the Rules of Evidence does not mean, however, that the Rules themselves place no limits on the admissibility of screening such evidence. To the contrary, under the Rules the trial judge *must* ensure that any and all scientific testimony or evidence admitted is not only relevant, but reliable."¹²⁶ The Court referred to this as the district judges' "gatekeeping role."¹²⁷

In uncharacteristic fashion, the Court then offered fairly specific guidance for discharging this screening function. The Court focused on the language of Rule 702, which provides, "If scientific, technical, or other specialized knowledge will assist the trier of fact to understand the evidence or to determine a fact in issue, a witness qualified as an expert by knowledge, skill, experience, training, or education, may testify thereto in the form of an opinion or

121. *Frye v. United States*, 54 App. D.C. 46, 293 F. 1013 (1923).

122. *E.g.*, *United States v. Shorter*, 809 F.2d 54, 59-60 (D.C. Cir. 1987), *cert. denied*, 484 U.S. 817 (1987).

123. *E.g.*, *DeLuca v. Merrell Dow Pharmaceuticals*, 911 F.2d 941, 955 (3rd Cir. 1990).

124. 113 S. Ct. 2786 (1993).

125. *Id.* at 2792-94.

126. *Id.* at 2794 (emphasis added).

127. *Id.*

otherwise.”¹²⁸ The Court stated that the adjective “scientific” implies a grounding in the “methods and procedures of science.” Additionally, the term “knowledge” connotes “more than subjective belief or unsupported speculation.” Combining these terms, the Court explained that to “qualify as ‘scientific knowledge,’ an inference or assertion must be derived by the scientific method” and must be supported by “appropriate validation.”¹²⁹

Thus, when faced with a proffer of expert testimony, the trial judge must determine at the outset whether the expert offers scientific knowledge.¹³⁰ This gatekeeping role entails a “preliminary assessment of whether the reasoning or methodology underlying the testimony is scientifically valid and of whether that reasoning or methodology properly can be applied to the facts in issue.”¹³¹

“Many facts will affect this inquiry,” according to the Supreme Court, which did “not presume to set out a definitive checklist or test.”¹³² Nonetheless, the Court did list the following general observations as “appropriate considerations.”

First, ordinarily a “key question” is whether the theory or technique has been tested. Second, another “pertinent consideration” is whether the theory or technique has been published or subjected to peer review. Third, in the case of a “particular scientific technique,” the judge “ordinarily” should consider the known or potential rate of error. Finally, that the theory is generally accepted “can yet have a bearing on the inquiry.”¹³³

The Court added that the inquiry under Rule 702 is a “flexible one” that focuses on “principles and methodology, not the conclusions that they generate.” The Court also observed that in making this flexible determination, the district judge may also exclude relevant evidence under Rule 403 if its probative value is outweighed by danger of unfair prejudice, confusion of the issues, or misleading of the jury.¹³⁴

The *Daubert* test is thus more defined than many analytical tools offered by the Supreme Court, but necessarily leaves much to the district courts for case-by-case refinement and application. *Daubert* is an essential read for federal practitioners, particularly those who present and oppose experts, both in deposition and at trial. At a minimum, counsel offering experts should ensure that as many of the four *Daubert* criteria are satisfied as possible (testing, publication or peer review, low rate of error, and general acceptance).

128. *Id.* at 2795.

129. *Id.*

130. Although the Court did not state this, presumably if the expert is testifying as to “technical” or “other specialized knowledge” per Rule 702, the judge must similarly ask whether the opinion involves “technical knowledge” or “other specialized knowledge” as must occur with scientific knowledge.

131. *Daubert*, 113 S. Ct. at 2795.

132. *Id.* at 2796.

133. *Id.*

134. *Id.*

Conversely, those confronting experts should carefully inquire into each factor at deposition to determine whether an argument can be made to exclude the entire opinion.

Finally, in the search for the presence or absence of *Daubert* factors, counsel should not overlook utilizing *other* experts. For instance, if the expert purports to offer a tested, published, errorless, and accepted theory or methodology, a cast of other experts might be able to persuade the trial judge otherwise for purposes of admissibility. This has always been a possibility for persuading the trier of fact, but should now be just as significant at summary judgment or motions in limine.

There will no doubt be much litigation over the flexible *Daubert* standard in the coming years. Because much has been left to the district courts, the most important battle on this issue in any case should be at the trial court rather than on appeal. It seems likely that if there is a reasoned basis under *Daubert* for the trial judge's admission or exclusion of expert testimony, the trial judge's discretion will not be disturbed absent obvious abuse.

The impact of *Daubert* was quickly felt in the Seventh Circuit in two significant cases. First, in *Frymire-Brinati v. KPMG Peat Marwick*,¹³⁵ the Seventh Circuit *reversed* a judgment entered after a jury verdict that was based in part on an accountant's "expert" testimony. In testifying as to the value of certain investments, the accountant did not use standard methodologies but instead made, in his own words, "a fairly simple pass at what the magnitude of the problem was."¹³⁶

Writing for the panel, Judge Easterbrook chastized the accountant and rejected his testimony outright. Relying on *Daubert*, Judge Easterbrook confirmed the trial judge's obligation to assess the expert's methodology before allowing purported expert testimony. Although Judge Easterbrook acknowledged that trial judges "possess considerable discretion in dealing with expert testimony," he held that "on this record the court could not properly have admitted [the expert's] valuation."¹³⁷

Similarly, in *Porter v. Whitehall Laboratories*,¹³⁸ the Seventh Circuit affirmed Judge Tinder's exclusion of proffered expert testimony. Plaintiff's experts sought to link the drug ibuprofen to renal failure. Judge Tinder excluded their opinions—even prior to *Daubert*—because they were not supported by scientific methodology, but were instead based on "a mere possibility of an unsupported and therefore hypothetical explanation for the acute renal fail-

135. 2 F.3d 183 (7th Cir. 1993).

136. *Id.* at 186.

137. *Id.* at 187.

138. 9 F.3d 607 (7th Cir. 1993).

ure.”¹³⁹ The Seventh Circuit agreed with Judge Tinder, noting that the “district court almost verbatim prophesied the language of the [*Daubert*] Court.”¹⁴⁰

Porter and *Peat Marwick* thus serve as indications that the Seventh Circuit expects and encourages district judges to fulfill their *Daubert* responsibilities to serve as gatekeepers of expert testimony. With hard work and careful questioning of experts, defense counsel could well find that *Daubert* is a blessing in disguise.

The following cases address other areas of interest regarding experts:

(1) Where a plaintiff visited a non-testifying consulting doctor at his attorney's request after filing the action, the consulting doctors' records were protected — not as work-product under Rule 26(b)(3) — but as protected non-testifying expert materials under Rule 26(b)(4)(B).¹⁴¹

(2) In the same case, where the consulting doctor's otherwise protected records were reviewed by plaintiff's *testifying* expert, Judge Endsley held that the records need not be produced because the testifying expert stated in his deposition that he reviewed the consultant's records but found them “unreliable” and “unimportant.”¹⁴² By contrast, where another testifying expert “considered” and “relied on or rejected, to some degree,” the consultant's documents, Judge Endsley held that the Rule 26(b)(4)(B) protection had been waived.¹⁴³

(3) In the same case, Judge Endsley rejected the defendant's arguments that the consulting doctor's report should be produced because plaintiff allegedly engaged in “expert shopping” by visiting three different experts and relying on only one.¹⁴⁴

(4) In the same case but in a subsequent opinion, Judge Endsley held that a Chicago doctor's hourly deposition charge of \$860 was *not* reasonable.¹⁴⁵ After carefully evaluating seven standard factors, Judge Endsley determined that the Chicago neurologist should be paid \$341.50 per hour for deposition time.¹⁴⁶

139. 791 F. Supp. 1335, 1342 (S.D. Ind. 1992).

140. 9 F.3d at 614.

141. *Dominguez v. Syntex Laboratories, Inc.*, 149 F.R.D. 158, 160 (S.D. Ind. 1993) (per Judge Endsley).

142. *Id.* at 162.

143. *Id.* at 164.

144. *Id.* at 162-63.

145. *Id.* at 166.

146. The factors considered were: (1) area of expertise; (2) education and training; (3) rates of comparable respected experts; (4) nature, quality, and complexity of responses provided; (5) fee actually charged to retaining party; (6) fees traditionally charged by the expert on related matters; and (7) any other factor likely to be of assistance. *Dominguez*, 149 F.R.D. at 167.

(5) Although time spent by an expert in deposition is compensable, time spent travelling to the deposition or in procuring copies of photographs is not.¹⁴⁷

(6) Where an accident reconstruction expert's report was initially said to exist but in fact was not created until later, where the report was later denied to exist, and where the expert's Rule 26(b)(4) summary of testimony was not timely provided, Judge Tinder did not abuse his discretion in barring the expert from testifying under Rule 37.¹⁴⁸

VII. TRIAL

As discussed at length in last year's article, peremptory challenges are now sharply limited by *Batson* and its progeny, which prohibit race-based challenges to prospective jurors.¹⁴⁹ During the survey period further developments occurred in this important area. In *Doe v. Burnham*,¹⁵⁰ for instance, the Seventh Circuit announced in *dicta* that district courts should not raise the issue of illegal *Batson* challenges, but instead should leave it to the parties to object to peremptory challenges believed to be race-based. The court wrote that trial judges "should at least wait for an objection before intervening in the process of jury selection to set aside a peremptory challenge." The court added:

Tradition engraves the process of peremptory challenges into our system; it is 'a procedure which has been part of our jury system for nearly 200 years.' Judges should invade a party's discretion to strike potential jurors only in narrow circumstances. We are aware of no case which authorizes a judge to invoke *Batson* when a party has never objected on that basis.¹⁵¹

Burnham is significant, for several federal judges in Indiana had adopted the practice in recent years of raising *Batson* objections *sua sponte*. After *Burnham*, such a practice is not condoned in the Seventh Circuit, and could even lead to reversible error.¹⁵²

147. *Rosenblum v. Warren & Sons, Inc.*, 148 F.R.D. 237 (N.D. Ind. 1993) (per Judge Sharp).

148. *Scaggs v. Consolidated Rail Corp.*, 6 F.3d 1290, 1295-96 (7th Cir. 1993).

149. See 1992 *Federal Practice*, *supra* note 21, at 845-49 (discussing *Batson v. Kentucky*, 476 U.S. 79 (1986) and related cases that restrict discretion in exercising peremptory challenges).

150. 6 F.3d 476, 481 (7th Cir. 1993).

151. *Id.*

152. In *Burnham* the judge denied two defense peremptory challenges of black jurors on her own motion. The Seventh Circuit reversed the eventual judgment for the plaintiff due to instructional error, so did not need to squarely address the *Batson* issue. Nonetheless, "to guide the district court on remand," the panel specifically discussed the judge's *sua sponte* action in some detail, and made quite clear its desire that district judges not involve themselves in self-policing of peremptories.

Separately, in *J.E.B. v. T.B.*,¹⁵³ the Supreme Court took up the issue of whether *Batson* extends to gender-based peremptories. The lower courts had split on this issue, with some (including the Seventh Circuit) refusing to extend *Batson* to gender,¹⁵⁴ and others prohibiting gender-based challenges.¹⁵⁵ By a six to three vote, the Supreme Court held that *Batson* prohibits prospective jurors from being excluded on account of gender. Neither women nor men can be excluded because of their gender. Practitioners should ensure that they have legitimate non-discriminatory reasons for striking any juror, particularly where race-based or gender-based discrimination could be argued by the opponents.

VIII. COSTS

Several significant decisions addressing costs were decided, and are summarized below:

(1) In a case of first impression, the Seventh Circuit affirmed Judge Tinder's dismissal of an action after plaintiff failed to post bond to ensure that costs could be paid if defendants prevailed.¹⁵⁶ Although no statute or rule expressly allows such a cost bond, the Seventh Circuit held that the "power to tax costs implies the ancillary power to take reasonable measures to ensure that the costs will be paid."

(2) Where an offer of judgment is made under Rule 68, and where defendant prevails such that plaintiff recovers nothing, trial courts lack the authority to award costs under Rule 68.¹⁵⁷ Interestingly, Rule 68 only applies where plaintiff recovers *something*, but less than the amount of the offer of judgment. Costs can still be awarded to defendants who prevail completely, however, under Rule 54(d).

(3) The expense of travel to take a deposition is not recoverable as costs.¹⁵⁸

(4) Although costs of videotaping a deposition may be taxed as costs, a party may not recover both the costs of videotaping and the costs of producing a transcript.¹⁵⁹

153. No. 92-1239, 1994 WL 132232 (Apr. 19, 1994).

154. See *United States v. Nichols*, 937 F.2d 1257 (7th Cir. 1991); *United States v. Broussard*, 987 F.2d 215 (5th Cir. 1993); *United States v. Hamilton*, 850 F.2d 1038 (4th Cir. 1988); *State v. Culver*, 444 N.W.2d 662 (Neb. 1989).

155. *United States v. DeGross*, 960 F.2d 1433 (9th Cir. 1992); *Tyler v. Maryland*, 623 A.2d 648 (Md. 1993).

156. *Anderson v. Steers, Sullivan, McNamar & Rogers*, 998 F.2d 495 (7th Cir. 1993).

157. *Lentomyynti Oy v. Medivac, Inc.*, 997 F.2d 364, 374-75 (7th Cir. 1993).

158. *Estate of Borst v. O'Brien*, 979 F.2d 511, 517 (7th Cir. 1992).

159. *Barber v. Ruth*, 7 F.3d 636, 645 (7th Cir. 1993). The decision was rendered prior to the

(5) Costs do not include attorneys' fees or witness travel and lodging expenses.¹⁶⁰

IX. APPEAL

Several significant developments occurred in federal appellate practice, and are highlighted below:

(1) Rule 3 of the Federal Rules of Appellate Procedure was amended effective December 1, 1993, to allow notices of appeal for multiple appellants to avoid listing all appellants individually in the notice, so long as the notice describes the appellants in terms such as "all plaintiffs or all plaintiffs except A."¹⁶¹

(2) Rule 4 of the Federal Rules of Appellate Procedure was amended to provide that a notice of appeal filed before the disposition of specified post-trial motions will now become effective upon disposition of the motion.¹⁶²

(3) Appellate briefs must now contain for each issue a "concise statement of the standard of the applicable standard of review," which may appear in the discussion of each issue or under a separate "standard of review" section preceding the issues.¹⁶³

(4) With an amendment to FED. R. CIV. P. 58, a timely petition for attorneys' fees (now due within 14 days of judgment under FED. R. CIV. P. 54) tolls the time for appeal *if* the district court so orders. Prior law allowed no such tolling, thus necessitating two separate appeals—one from the judgment, and one from the later ruling on fees.

(5) An order denying intervention is immediately appealable, and the right to appeal it lost if appeal is not taken within 30 days.¹⁶⁴

amendments to Rule 30 allowing depositions to be videotaped without leave of court or consent. It does not appear, however, that the amendments to Rule 30 would change the result.

160. *Thomas v. Caudill*, 150 F.R.D. 147 (N.D. Ind. 1993) (per Judge Rodovich).

161. FED. R. APP. P. 4(c) (1993). This amendment is intended to alleviate the problems caused by *Torres v. Oakland Scavenger Co.*, 487 U.S. 312 (1988), which held that jurisdiction over all appellants was lacking if the notice of appeal names the first-named appellant and then uses "et al." without listing every appellant.

162. FED. R. APP. P. 4(a)(4). Under prior law, such premature notices of appeal were without effect, thus requiring the filing of a second notice of appeal after disposition of the post-trial motion. *Griggs v. Provident Consumer Discount Co.*, 459 U.S. 56 (1982); *Lentomynti Oy v. Medivac, Inc.*, 997 F.2d 364, 366 (7th Cir. 1993).

163. FED. R. APP. P. 28(a)(5).

164. B.H. by *Pierce v. Murphy*, 984 F.2d 196, 198-99 (7th Cir. 1993).

(6) Where a plaintiff appealed from an adverse ruling from Judge Steckler after a bench trial in a Title VII employment discrimination claim, and where the appeal only attacked factual findings involving disputed evidence, the Seventh Circuit assessed sanctions against appellant's counsel.¹⁶⁵ The decision serves as the latest reminder that the Seventh Circuit takes sanctions seriously, and will not tolerate appeals where the "result is obvious."¹⁶⁶

X. MISCELLANEOUS

Finally, a number of miscellaneous developments occurred that require mention. In the sanctions area, Rule 11 was amended with four major changes. First, no motion for sanctions under Rule 11 can be filed until twenty-one days *after* a copy of the motion was first served on the opponent.¹⁶⁷ If the offending paper is not withdrawn or corrected within those twenty-one days, the Rule 11 motion can then be filed. This procedural change effectively imposes a twenty-one-day safe harbor provision, and is intended to encourage withdrawal of frivolous filings.

The second change is that absent "exceptional circumstances," law firms are to be held jointly responsible for Rule 11 violations committed by their attorneys and employees.¹⁶⁸ This supersedes the Supreme Court's 1989 decision in *Pavelic & LeFlore*,¹⁶⁹ and is intended to encourage law firms to collectively consider withdrawal of frivolous filings.

The third change is that Rule 11 now applies not only to the initial filing of frivolous papers, but also to "later advocating" a paper that is frivolous.¹⁷⁰ Thus, unlike prior law, a plaintiff filing a frivolous complaint in state court can be subject to Rule 11 sanctions in federal court for pursuing the action after removal.

The fourth major change is Rule 11's treatment of sanctions. The prior version of Rule 11 required some sanction to be imposed upon a Rule 11 violation (by use of the term "shall"), while new Rule 11 allows the court discretion by using the term "may" impose an appropriate sanction.¹⁷¹ Further, new Rule 11 has an apparent preference for non-monetary sanctions in lieu of fees.

Separately, the Northern District of Indiana enacted new local rules effective January 1, 1994. The highlights include:

165. *Rennie v. Dalton*, 3 F.3d 1100, 1111 (7th Cir. 1993).

166. *Id.* at 1111.

167. FED. R. CIV. P. 11(c)(1)(A) (1993).

168. *Id.*

169. 493 U.S. 120 (1989).

170. FED. R. CIV. P. 11(b).

171. Fed. R.Civ. P. 11(c).

- (1) Initial enlargements for pleadings and discovery can be done by consent and notice as in the Southern District.¹⁷²
- (2) Briefs are limited to twenty-five pages absent “extraordinary and compelling reasons.”¹⁷³
- (3) Notices of serving discovery requests no longer need be prepared and filed, but requests for admissions and responses thereto are to be filed with the court.¹⁷⁴
- (4) Parties are encouraged to resort to judicial phone conferences to resolve deposition disputes.¹⁷⁵

172. N.D. IND. L.R. 6.1.

173. N.D. IND. L.R. 7.1.

174. N.D. IND. L.R. 26.2.

175. N.D. Ind. L.R. 37.3.

1993 DEVELOPMENTS IN INDIANA APPELLATE PROCEDURE: CHANGES IN ORIGINAL ACTIONS, REHEARING AND TRANSFER

GEORGE T. PATTON, JR.*

INTRODUCTION

During 1993, Indiana appellate procedure continued to develop. The changes are most recognizable in rule amendments effective January 1, 1994. The Indiana Supreme Court revamped the original action rules,¹ extended the time deadlines for petitioning for rehearing and transfer,² added a procedure for interlocutory appeals from the tax court,³ and narrowed the requirement to set forth the course of proceedings in the statement of case section of the brief of appellant.⁴ These changes will simplify and ease the burdens on lawyers applying the Indiana Rules of Appellate Procedure.

Changes in appellate procedure also occurred during 1993 as a result of court decisions applying the rules and common law in specific factual settings. Indiana's appellate courts handed down a number of important decisions on appellate procedure. The Indiana Supreme Court held that a party was procedurally entitled to obtain a trial court determination of unaddressed error specifications on remand after reversal on appeal,⁵ that the court of appeals retained jurisdiction to rule on a petition for rehearing until the high court granted a petition to transfer,⁶ and that a court reporter would be held in contempt for failing to complete a transcript in a timely manner.⁷ The court of appeals also decided a number of cases important to the appellate practitioner.⁸

* Associate, Bose, McKinney & Evans, Indianapolis. Adjunct Assistant Professor of Appellate Advocacy, Indiana University School of Law—Bloomington. A.B., *cum laude*, 1984, Wabash College; J.D., *cum laude*, 1987, Indiana University School of Law—Bloomington; Law Clerk to Chief Justice Randall T. Shepard, Indiana Supreme Court, 1987-1989. I thank Chief Justice Randall T. Shepard and Administrator Kimberly A. Bradford of the Indiana Supreme Court as well as Ronald E. Elberger, Stephen E. Arthur, and Debra L. Burns of Bose McKinney & Evans for reviewing a draft of this article. Any errors or omissions, however, remain my own.

1. IND. ORIG. ACT. R. (effective Jan. 1, 1994).

2. IND. APP. R. 11 (effective Jan. 1, 1994).

3. IND. APP. R. 18(C) (effective Feb. 1, 1994).

4. IND. APP. R. 8.3(A)(4) (effective Jan. 1, 1994).

5. *Riggs v. Burell*, 619 N.E.2d 562 (Ind. 1993).

6. *Indiana Carpenters Cent. & Western Ind. Pension Fund v. Seaboard Sur. Co.*, 615 N.E.2d 892 (Ind. 1993).

7. *In re Hatfield*, 607 N.E.2d 384 (Ind. 1993).

8. *E.g.*, *Koch v. James*, 616 N.E.2d 759, 760-61 (Ind. Ct. App. 1993) (court order to sell stock interlocutorily appealable as of right under Indiana Appellate Rule 4(B)(1) as "delivery" of securities); *Mullis v. Martin*, 615 N.E.2d 498, 500 (Ind. Ct. App. 1993) (noncompliance with appellate rules waived issues raised on appeal); *Board of Comm'r of Lake County v. Foster*, 614 N.E.2d 949, 950 (Ind. Ct. App. 1993) (interlocutory appeal dismissed for failure to file the praecipe within ten days after court of appeals accepts jurisdiction); *Smith v. State*, 610 N.E.2d 265, 267 n.1

In addition to the changes in the rules of appellate procedure and recent decisions affecting the appellate practitioner, judges and lawyers should consider what lies on the horizon for Indiana's appellate courts. A new justice has joined the Indiana Supreme Court, new rules of evidence will be applied by the appellate courts, and rules may be refined in the future to improve appellate procedure in the state.

All lawyers who practice before Indiana's appellate courts should be familiar with the new rules, cases, and trends. Part I of this Article discusses the amendments to the rules of appellate procedure. Part II analyzes recent cases on Indiana appellate procedure. The final section reviews likely trends that will impact Indiana's appellate courts in the future.

I. AMENDMENTS TO THE INDIANA APPELLATE RULES

The Indiana Supreme Court made substantial changes to the procedural rules for original actions. The court also amended three rules of appellate procedure—one dealing with time deadlines for rehearing and transfer, another adding a procedure for interlocutory appeals from the tax court, and the third rule limiting the need to set forth the entire course of proceeding in the appellant's brief. These developments will be discussed in turn.

A. *Original Actions*

The Indiana Supreme Court has "exclusive, original jurisdiction to supervise the exercise of jurisdiction of all inferior state courts, including the Court of Appeals" by virtue of the state constitution and the appellate rules.⁹ When a party commences an original action in the Supreme Court seeking either a writ of mandamus or a writ of prohibition against an inferior state court and the judge or judges of the lower court, the action is "concerned solely with the question of jurisdiction . . . and shall be governed exclusively by" the original action rules.¹⁰ On October 29, 1993, the Indiana Supreme Court amended the original actions rules effective January 1, 1994. As the Supreme Court Administrator stated, "These are the most substantial amendments since the inception of [the present] original action [rules] in Indiana."¹¹

Prior to these amendments, a party applying for an original action (known as the relator) needed to meet personally with the Supreme Court Administrator

(Ind. Ct. App. 1993) (statement of facts inadequate); *Wenger v. Weldy*, 605 N.E.2d 796, 797 n.1 (Ind. Ct. App. 1993) ("Ind. Appellate Rule 8.2(B)(1) provides the method of citation to be used by counsel . . . in the preparation of briefs. When citing decision by the Court of Appeals, no reference should be made to individual districts.").

9. IND. ORIG. ACT. R. 1(A) (effective Jan. 1, 1994) (citing IND. CONST. art. 7 § 4 (1851); IND. APP. R. 4(A)(5)).

10. IND. ORIG. ACT. R. 1(B) (1993).

11. Greg Kueterman, *Court Procedures Eased for Attorneys in Amendments*, IND. LAW., Nov. 17, 1993, at 14, col. 3-4.

in Indianapolis who had limited authority by rule to set a hearing on the request “[i]f there [was] no question as to completeness or form of the application, or the appropriateness of the remedy.”¹² If the Supreme Court Administrator had “a question as to the appropriateness of the original action remedy, the Administrator [was required] to confer with the Chief Justice to determine if a hearing [would] be scheduled.”¹³ If set for a hearing before the full court, the relator would then personally serve the opposing party and the judge(s) below (known as the respondents) with the application papers and notice of the hearing.¹⁴ The former rule provided, “No application for a writ of mandamus or prohibition and no application papers shall be filed by any party with the Clerk of the Supreme Court until after the hearing on the application”¹⁵ If after the hearing, the Supreme Court denies the application the “relator may request the administrator to return the filing fee, . . . and the original action shall be terminated automatically and no papers shall be filed thereafter with the clerk.”¹⁶ In those instances, the Supreme Court would not have handed down a written ruling.

In summary, an attorney filing application papers for an original action under the previous rules would have to travel to the State House and present the papers to the Supreme Court Administrator, who could unilaterally set a hearing before the five justices of the Supreme Court. The attorney would then personally serve the application papers and hearing notice on the respondents. If the Supreme Court denied the application following the hearing, the relator could walk away without paying a filing fee.

While this process could be simple and inexpensive if counsel and the inferior court were in close proximity to Indianapolis, attorneys in the far northern or southern parts of the state could spend an entire day largely on travel. In order to relieve the inconvenience to lawyers and the court itself, the Supreme Court amended the original action rules to save lawyers’ time. The new rule provides:

(B) Submission of Applications to Supreme Court Administrator. Except for application for emergency writs, all applications for writs of mandamus or prohibition, along with the filing fee, shall be submitted in person or by mail to the Supreme Court Administrator, 313 State House, Indianapolis, Indiana 46204, telephone (317) 232-2540, TDD (317) 233-6110. Relator shall serve Respondents and all interested parties on the same day the Relator’s writ application is submitted in person or by mail to the Supreme Court. Delivering a copy of the papers to an interested party’s office is personal service on that party

12. IND. ORIG. ACT. R. 2(B) (1993).

13. *Id.*

14. *Id.*

15. *Id.*

16. IND. ORIG. ACT. R. 5(B) (1993).

within the meaning of these Rules. If emergency relief is requested, Relator must submit the application papers to the Administrator in person after personal service on Respondents and all interested parties. Otherwise, service on the Respondents and interested parties shall be accomplished in the same fashion as service on the Administrator, except that personal service shall always be acceptable.

(C) Filing of Applications. The Supreme Court Administrator shall arrange to have original action applications filed with the Clerk. At the time of filing Relator's filing fee will be deposited.

(D) [Submission to Chief Justice.] The Supreme Court Administrator shall submit all original action applications to the Chief Justice or Acting Chief Justice after filing. If the application is incomplete or in improper form or seeks an unquestionably inappropriate remedy, the Chief Justice or Acting Chief Justice shall enter an order dismissing the application without the intervention of the full Court. In all other cases, the Chief Justice or Acting Chief Justice shall determine whether the case should be immediately set for hearing or referred to the full Court.

If the Chief Justice or the full Court decides to set the case for hearing, the Supreme Court Administrator shall complete and file the notice of hearing. The Supreme Court Clerk shall send copies of the notice of the hearing to Relator, Respondents, and all interested parties, including the Attorney General as required by Ind. Original Action [R.] 6(D). However, the Court may decide to grant or deny the original action without hearing.¹⁷

The significant changes are: (1) application papers, except if applying for an emergency writ, can be submitted by mail rather than in person to the Supreme Court Administrator; (2) the Administrator no longer has the discretion to set a hearing on the application; (3) the Administrator forwards the application papers to the Clerk for immediate filing and depositing of the filing fee; and (4) the Clerk sends copies of the notice of hearing to the parties.

The Indiana Supreme Court has further specified what a lawyer must submit to initiate an original action. For example, the rule lists six allegations that need to be set forth in the verified petition for writ of mandamus or prohibition and "[o]riginal action applications which do not include all of the applicable allegations . . . shall be rejected by the Chief Justice or Acting Chief Justice."¹⁸ No longer is the Supreme Court Administrator required by rule to "inform the relator of each reason for rejecting the application."¹⁹

17. IND. ORIG. ACT. R. 2 (effective Jan. 1, 1994).

18. IND. ORIG. ACT. R. 3(A) (effective Jan. 1, 1994).

19. IND. ORIG. ACT. R. 2(B) (1993).

In addition to a verified petition, a supporting brief is necessary but need not be bound.²⁰ At the time the relator submits the original action petition and brief, the relator must also submit a certified record of proceeding from the lower court.²¹ "The record . . . shall include a current copy of the chronological case summary."²² "The original action record need not be bound like an appellate record, but it should contain a table of contents at the beginning and be enumerated for purposes of citation to the record."²³ The rules require the relator to submit both an alternative and permanent proposed writ. If an emergency writ is sought, an emergency writ form must also be submitted.²⁴ Form No. 4 is the new form for an emergency writ of mandamus or prohibition.²⁵

An emergency writ operates as a temporary stay of the trial court proceedings until the Indiana Supreme Court hears and rules upon the original action application.²⁶ An emergency writ is granted prior to a hearing before the Indiana Supreme Court, following the submission of the regular application papers plus a special petition for emergency writ which replaces the prior affidavit of emergency.²⁷ A relator requesting an emergency writ must present to the Administrator all original action application papers in person after personal service on the respondents and all other interested parties.²⁸ The Administrator then forwards the application for the emergency writ to the Chief Justice, if available, or the Acting Chief Justice, for a determination as to whether a sufficient emergency exists to require a stay.²⁹ "If the Chief Justice or the Acting Chief Justice grants the emergency writ, the writ shall be filed immediately and the original action set for hearing."³⁰ The filing of a petition for emergency writ does not obviate the need to file the other application papers, including specifically the petition for a writ of mandamus or prohibition.³¹

20. IND. ORIG. ACT. R. 3(B) (effective Jan. 1, 1994).

21. IND. ORIG. ACT. R. 3(C) (effective Jan. 1, 1994).

22. *Id.*

23. *Id.*

24. IND. ORIG. ACT. R. 3(E) (effective Jan. 1, 1994).

25. IND. ORIG. ACT. FORM NO. 4 (effective Jan. 1, 1994).

26. IND. ORIG. ACT. R. 3(E)(1) (effective Jan. 1, 1994). One wonders why this amendment refers to the "trial court" when writs can be issued against any court inferior to the Supreme Court, such as the Indiana Court of Appeals or the Indiana Tax Court. IND. ORIG. ACT. R. 1(B) (1993).

27. IND. ORIG. ACT. R. 3(E)(1) (effective Jan. 1, 1994); *see also* IND. ORIG. ACT. R. 3(F) (1993) ("If relator desires an immediate hearing on the application, [the relator] shall submit with his petition a separate affidavit showing clearly that an extreme emergency exists which necessitates an immediate hearing.").

28. IND. ORIG. ACT. R. 3(E)(1) (effective Jan. 1, 1994).

29. *Id.*

30. *Id.*

31. *Id.*

An alternative writ is an order that requires respondents to exercise jurisdiction (*mandamus*), to cease exercising jurisdiction (*prohibition*), or both.³² If the Supreme Court issues an alternative writ, respondents must file a "return" with the Supreme Court no later than twenty days after the filing of the writ.³³ A "return" is a pleading submitted by the lower court demonstrating compliance with the writ or stating why the writ should not be made permanent.³⁴

"A Permanent Writ is an order, issued after the application is made, which is immediately permanent."³⁵ A permanent writ dispenses with the general practice of allowing the respondents—generally, the opposing party and court below—to file a return.³⁶ "In rare instances, a court clerk may be an additional Respondent."³⁷

Each party requesting a writ shall submit an original and five copies of each application paper, instead of the original and six copies required by the former rule.³⁸ An amendment clarifies that an original and five copies of the record are also required.³⁹ Each justice needs a copy of the record of proceedings.

The Supreme Court Administrator, in conjunction with the chief justice sets the hearing usually not less than one week from submission.⁴⁰ An earlier hearing date may be granted if relator demonstrates in the petition or emergency petition that an extreme emergency necessitates an earlier hearing.⁴¹ At the hearing, an "[a]pppearance by the respondent judge or the judge's counsel is not necessary; the party opposing the Relator in the trial court may oppose the original action application."⁴² The new rule provides, "In the event the respondent judge or the judge's counsel appear, the respondent judge or the judge's counsel shall be given an opportunity to speak regardless of whether others opposing the original action have used the thirty minutes allotted to that side."⁴³

Upon completion of the oral argument in the Supreme Court Conference Room, the court asks the parties to leave the room and begins deliberation.⁴⁴ "When the Court concludes its deliberation, the parties [are] recalled . . . to learn

32. IND. ORIG. ACT. R. 3(E)(2) (effective Jan. 1, 1994).

33. *Id.*

34. *Id.*

35. IND. ORIG. ACT. R. 3(E)(3).

36. *Id.*

37. IND. ORIG. ACT. R. 1(C) (effective Jan. 1, 1994).

38. IND. ORIG. ACT. R. 3(I) (effective Jan. 1, 1994) (Although the former rule required an original and six copies of the application papers, the administrator, in practice, has been informally accepting an original and five copies for years.).

39. *Id.*

40. IND. ORIG. ACT. R. 4(A) (effective Jan. 1, 1994).

41. *Id.*

42. IND. ORIG. ACT. R. 4(C) (effective Jan. 1, 1994).

43. *Id.*

44. IND. ORIG. ACT. R. 4(E) (1993).

the Court's decision."⁴⁵ A 1993 amendment states, "In cases where the Court is unable to reach an immediate decision or where a Justice is absent, the Court may delay ruling until such time as agreement is reached or the absent Justice is able to consider the case."⁴⁶

If the Supreme Court issues an alternative writ, the respondent court has twenty days to file a return showing compliance with the writ or stating reasons why the writ should not be made permanent.⁴⁷ "If the return shows compliance with the alternative writ, the Supreme Court will enter an order dismissing the original action as moot."⁴⁸ If the Supreme Court denies the application, "an order of denial shall be entered expeditiously. The denial of the application will end the proceedings, regardless of whether the Court has conducted a hearing."⁴⁹ No party shall file a petition for rehearing or a motion to reconsider after final disposition of the original action.⁵⁰

B. Petitions for Rehearing and Transfer

The Supreme Court amended Indiana Appellate Rule 11 effective January 1, 1994, extending the time deadlines for petitioning for rehearing and transfer.⁵¹ The Supreme Court Committee on Rules of Practice and Procedure recommended the extension:

The Committee proposed a small increase to the time limits for filing petitions for rehearing and transfer after rendition of the Court of Appeals decision. The proposed amendment would increase the time for filing a petition for rehearing or transfer from the 20 days now provided to 30 days. Briefs in opposition under the proposed amendment would be due in 15 days rather than 10 days. The amendment was proposed to afford those in solo, small or largely appellate law practices slightly more flexibility with scheduling due to the fact that rehearing and transfer deadlines are non-extendable.⁵²

The Supreme Court agreed with the committee's proposal extending the deadline from twenty to thirty days for filing a petition for rehearing or transfer, and from ten to fifteen days for briefs in opposition.⁵³

45. IND. ORIG. ACT. R. 4(E) (effective Jan. 1, 1994).

46. *Id.*

47. IND. ORIG. ACT. R. 5(A) (effective Jan. 1, 1994).

48. *Id.*

49. IND. ORIG. ACT. R. 5(B) (effective Jan. 1, 1994).

50. IND. ORIG. ACT. R. 5(C) (effective Jan. 1, 1994).

51. IND. APP. R. 11 (effective Jan. 1, 1994).

52. *In the Supreme Court of Indiana*, 36 RES GESTAE 578, 580 (1993); *see also* IND. APP. R. 11(A) (1993) ("No extension of time shall be granted for a petition for rehearing or any brief in connection therewith."); IND. APP. R. 11(B)(8) (1993) ("No extension of time shall be granted for the filing of the petition to transfer or accompanying briefs.").

53. IND. APP. R. 11 (effective Jan. 1, 1994).

While the Supreme Court will still utilize the same time lengths for rehearing and transfer,⁵⁴ the court did clarify in 1993 that the court of appeals retains jurisdiction to rule on a petition for rehearing until the time that the Supreme Court *grants* a petition to transfer.⁵⁵ The question arose in a recent appeal where both parties were dissatisfied with the opinion of the court of appeals. One party petitioned the court of appeals for rehearing and the other party petitioned the Supreme Court to accept transfer on the same day, the last day of the twenty day non-extendable time deadline. In denying the petition for rehearing, the court of appeals held that effective at the time of *filing* the petition for transfer, the court of appeals was divested of jurisdiction.⁵⁶ In a *per curiam* opinion, the Supreme Court wrote:

From time to time a question arises regarding the jurisdiction of the Court of Appeals to rule on a petition for rehearing when a petition to transfer has been filed by another party in the same action. . . . To clarify this jurisdictional issue, we note here this Court's view that the Court of Appeals retains jurisdiction to rule on a petition for rehearing until the time that a petition to transfer is granted. While not compelled by rule, it has been the customary practice of this Court to delay ruling on a petition to transfer when a petition for rehearing is pending before the Court of Appeals, particularly since these delays generally are brief.⁵⁷

The court of appeals retains jurisdiction to rule on a petition for rehearing until the Supreme Court *grants* transfer, not simply until the filing of a petition for transfer.

Since 1988, a party no longer has a mandatory duty to petition the court of appeals to rehear an appeal in order to file a petition for transfer.⁵⁸ If a party does file a petition for rehearing, "the petition to transfer shall be limited to only those grounds set forth in the petition for rehearing in the Court of Appeals."⁵⁹

54. See George T. Patton, Jr., *1992 Developments in Indiana Appellate Procedure: Of Timely Praecipies, Interlocutory Appeals, and Civility*, 26 IND. L. REV. 799, 811-12 (1993) (proposing shorter deadline to petition for rehearing in court of appeals and longer period to petition for transfer to the Supreme Court such that if any party petitioned for rehearing in the court of appeals it would toll the time for any party to petition for transfer).

55. *Indiana Carpenters Cent. & W. Ind. Pension Fund v. Seaboard Sur. Co.*, 615 N.E.2d 892 (Ind. 1993).

56. *Indiana Carpenters Cent. & W. Ind. Pension Fund v. Seaboard Sur. Co.*, No. 49A02-9111-CV-510 (Ind. Ct. App. March 9, 1993).

57. *Indiana Carpenters*, 615 N.E.2d at 892.

58. IND. APP. R. 11(B) (1993). The 1988 amendment provided:

Provided further, the party seeking transfer shall have the right at his option, without first filing a petition for rehearing in the Court of Appeals and having it denied, to petition the Supreme Court directly within twenty (20) days from the date of the rendition of the decision of the Court of Appeals to transfer the cause to the Supreme Court for review.

59. IND. APP. R. 11(B) (1993).

While this rule made sense when rehearings were mandatory, it serves no purpose to require a party to present all issues originally presented in the briefs that the party knows the court of appeals is unlikely to reconsider. For example, assume the court of appeals misstated a fact in the record. A party should be able to file a petition for rehearing seeking correction of the misstated fact without having to raise other issues that both the party and the court of appeals knows will not be reconsidered. In other words, the rule should be amended to read, “[T]he petition to transfer shall be limited to those grounds set forth *in the briefs* and the petition for rehearing in the Court of Appeals.” This amendment would allow a party to file a shorter petition for rehearing without waiving other issues already argued in the briefs before the court of appeals.

The Supreme Court Committee on Rules of Practice and Procedure also recommended in 1993 that “[a]n opposition brief [to rehearing] may assert grounds which show that the decision should remain unchanged, or it may present other grounds which show that the party filing the brief is entitled to other relief.”⁶⁰ The Supreme Court accepted the recommendation but edited the language, so as of January 1, 1994, the rule reads, “An opposition brief [to rehearing] may assert grounds which show that the decision should remain unchanged, or it may present other grounds for rehearing.”⁶¹

With respect to petitions for transfer, the committee proposed similar language as well as a reply brief limited to new grounds asserted for transfer by the respondent:

A brief in opposition [to a petition for transfer] may assert grounds which show that transfer should be denied, or it may present other grounds which show that the party filing the brief in opposition is entitled to other relief. If the other relief requested is a transfer of the cause upon different grounds, subsection (B)(2) of the Rule must be complied with.⁶²

Where a respondent to a petition to transfer asserts grounds for transfer or asserts that respondent is entitled to other relief, the petitioner shall be entitled to file a reply brief within fifteen (15) days of the filing of the brief in opposition to the petition to transfer. In no other circumstances shall a party be entitled to file a reply brief on transfer and the reply brief shall only include argument on the new grounds for transfer raised by respondents.⁶³

60. *In the Supreme Court of Indiana*, 36 RES GESTAE 578, 580 (1993).

61. IND. APP. R. 11(A) (effective Jan. 1, 1994).

62. *In the Supreme Court of Indiana*, 36 RES GESTAE 578, 580 (1993).

63. IND. APP. R. 11(B)(6) (The Supreme Court Committee on Rules of Practice and Procedure added this paragraph to the proposal pursuant to comments received from the bar.).

The Supreme Court did not accept these proposals with respect to transfer and during the past year has stricken a reply brief in support of petition for transfer.

C. *Interlocutory Appeals From Tax Court*

In 1992, the Indiana Supreme Court added a new procedure for appeals from the tax court.⁶⁴ The procedures provided for Supreme Court review of final decisions of the tax court, but provided no procedural mechanism to review interlocutory decisions of the tax court. On January 18, 1994, the Indiana Supreme Court amended Appellate Rule 18(C) as follows:

Any party adversely affected by a final decision of the Tax Court shall have a right to petition the Supreme Court for review of such decision. Such Petition shall be filed within thirty (30) days from the date of the decision and such petition shall not exceed five (5) pages in length. *Any party adversely affected by an interlocutory order of the Tax Court may petition the Supreme Court for review of such decision pursuant to the procedure enunciated in Ind. Appellate Rule 4(B)(6).*⁶⁵

A party would have to move the tax court to certify any interlocutory order for appeal, and, if the tax court certifies the interlocutory order, petition the Supreme Court within thirty days of the certification.⁶⁶ If the Supreme Court accepts jurisdiction, a praecipe would need to be filed no later than ten days after the Supreme Court grants the petition for interlocutory appeal.⁶⁷ The record of proceedings would be due no later than thirty days after the filing of the praecipe.⁶⁸ The appellant would have ten days after the filing of the record to submit a brief, the appellee would have ten days after the filing of the appellant's brief to submit an answer brief, and the appellant would have five days to submit a reply brief.⁶⁹

The only question raised by this amendment providing for interlocutory appeals from the tax court is whether the rule should provide any grounds for mandatory interlocutory appellate review such as provided in Appellate Rule 4(B)(1) through 4(B)(5). For example, if the tax court granted an injunction—a ground for a mandatory interlocutory appeal under Appellate Rule 4(B)(3)—the tax court and the Supreme Court both would have the discretion to deny interlocutory appellate review under the new rule. In limiting interlocutory review to orders in which both the tax court and the Supreme Court agree that interlocutory review is warranted, the Supreme Court is probably exercising control over its jurisdiction and docket. The Supreme Court will consider the

64. IND. APP. R. 18 (effective Jan. 1, 1992).

65. IND. APP. R. 18(C) (effective Feb. 1, 1994).

66. IND. APP. R. 2(A) (1993).

67. *Id.*

68. IND. APP. R. 3(B) (1993).

69. IND. APP. R. 8.1(B) (1993).

nature of the appeal in exercising its discretion but counsel seeking interlocutory appellate review of an order of the tax court should be sure to point out to the tax court and Supreme Court that a similar appeal from a trial court to the court of appeals would be a mandatory interlocutory appeal under Appellate Rule 4(B)(1) through 4(B)(5). Such arguments should make the tax court and Supreme Court more likely to allow the interlocutory appeal.

D. Shorter Statement of the Case

Finally, with respect to the 1993 amendments to the Indiana Rules of Appellate Procedure, the Supreme Court accepted the committee's recommended change in requirements in the course-of-proceedings subsection of the statement-of-the-case portion of the brief of the appellant: "(4) *A statement of the case.* The statement shall first indicate briefly the nature of the case, the course of proceedings *relevant to the issues presented for review*, and its disposition in the court below, including a verbatim statement of the judgment."⁷⁰

The committee noted that "a statement of the case is a *brief* chronological narrative of the events leading to the appeal. The purpose of this statement is to clarify the nature of the case, the course of proceedings, and its disposition in the court below."⁷¹ Irrelevant matter such as "routine motions for continuances, depositions, production of evidence and appearance/withdrawal of counsel" should not be part of the statement of the case.⁷² The committee proposed this amendment so that the rule would conform with the rule requiring "[a] statement of facts *relevant* to the issues."⁷³

II. DECISIONS ON INDIANA APPELLATE PROCEDURE

The Indiana Supreme Court and the Indiana Court of Appeals have handed down a number of important decisions on appellate procedure. For ease of understanding in this Article, these cases have been broken down into the following four categories: first, two decisions addressing the need to remand a case to address unresolved issues following reversal on appeal; second, various opinions discussing dismissals of appeals; third, a decision deciding the propriety of an interlocutory appeal of a court order to sell stock; and finally, miscellaneous cases discussing non-compliance with the appellate rules.

70. IND. APP. R. 8.3(A)(4) (effective Jan. 1, 1994) (emphasis added).

71. *In the Supreme Court of Indiana*, 36 RES GESTAE 578, 579 (1993) (citing 4A KENNETH M. STROUD, INDIANA PRACTICE § 7.2, at 93 (2d ed. 1990)).

72. *Id.*

73. *Id.* (citing IND. APP. R. 8.3(A)(5)) (emphasis added).

*A. Remand To Address Unresolved Issues
Following Appellate Reversal*

In 1993, the Supreme Court addressed the issue of whether an appellate reversal of a trial court's grant of a new trial on only one of multiple grounds precludes judicial consideration of the unaddressed grounds on remand.⁷⁴ Following a trial and jury verdict in favor of defendants, the plaintiffs filed a motion to correct error which asserted seven separate grounds.⁷⁵ Addressing only two of these grounds, the trial court granted plaintiffs' motion to correct error and granted a new trial.⁷⁶ "[Defendants] appealed and the Court of Appeals reversed and remanded with instructions to reinstate the judgment entered upon the verdict."⁷⁷

Upon remand, the trial court refused to rule on the plaintiffs' five remaining grounds originally unaddressed in the motion to correct error.⁷⁸ The court of appeals affirmed the trial court's refusal.⁷⁹ The Supreme Court granted transfer.

The Supreme Court, as did the court of appeals, rejected the argument that the five unaddressed grounds were deemed denied pursuant to Indiana Trial Rule 53.3. "[O]nce the [trial] judge was satisfied that a new trial was merited, no reason existed to rule on the remaining specifications of error or to state additional reasons for ordering a new trial."⁸⁰ The Supreme Court noted that this "parallels the practice in courts of appeal, where rulings are not required on additional issues once reversible error is found."⁸¹

The Supreme Court, however, disagreed with the court of appeals' application of the law of the case doctrine.⁸² The Supreme Court found that the initial opinion of the court of appeals resolved two issues: "1) there was disputed evidence regarding the possible negligence of Rachel Riggs and 2) the trial court failed to make sufficient findings to support its determination that the verdict was against . . . the evidence."⁸³ In this appeal, plaintiffs sought a ruling on five alleged errors "not conclusively decided by the essential holding" in the prior court of appeals opinion.⁸⁴ The Supreme Court found that the law of the case doctrine did not preclude plaintiffs from obtaining a ruling on the five unaddressed grounds and remanded the case to the trial court for consideration.⁸⁵

74. *Riggs v. Burell*, 619 N.E.2d 562 (Ind. 1993).

75. *Id.* at 563.

76. *Id.*

77. *Id.* (citing *Burell v. Riggs*, 557 N.E.2d 698 (Ind. Ct. App. 1990)).

78. 619 N.E.2d at 563.

79. *Id.* (citing *Riggs v. Burell*, 596 N.E.2d 268 (Ind. Ct. App. 1992)).

80. 619 N.E.2d at 563.

81. *Id.*

82. *Id.* at 564-65.

83. *Id.* at 564.

84. *Id.* at 564-65.

85. *Id.* at 565.

The Supreme Court has recently followed the same practice with decisions of the court of appeals that reverse on one ground and leave other issues unaddressed on appeal. On transfer, if the Supreme Court determines that the sole ground cited for reversal is incorrect, the Supreme Court will remand the case to the court of appeals to address the additional arguments on appeal.⁸⁶ After being convicted of bribery, a criminal defendant brought an appeal raising the statute of limitations and other defenses.⁸⁷ The court of appeals reversed the bribery conviction on the grounds that the information failed to allege facts showing that the state filed the charges within the applicable statute of limitations.⁸⁸ The Supreme Court granted transfer concluding that the conviction should not have been reversed on these grounds: "Accordingly, we grant transfer, vacate the opinion of the Court of Appeals, and remand this case to the Court of Appeals for consideration of the other issues raised by Willner in his appeal."⁸⁹ Previously, the Supreme Court would have ordinarily addressed the other issues without remanding the case to the court of appeals.

B. Dismissals On Appeal

The court of appeals dismisses a number of appeals for various reasons. Although this Article does not attempt to discuss every appellate dismissal, the more noteworthy ones can be educational. They can teach lawyers how to avoid procedural traps. For example, the court of appeals dismissed an interlocutory appeal pursuant to Indiana Appellate Rule 4(B)(6) when the appealing party failed to file a praecipe with the clerk of the trial court within ten days of the order of the court of appeals accepting jurisdiction.⁹⁰ The court of appeals stated:

If one intends to appeal a judgment or order, he must follow the procedural mandates of the appellate rules. In this case, the Board was required to file its praecipe no later than ten days after this Court granted its petition for interlocutory appeal Therefore, since this appeal was untimely filed, the Board has forfeited its right to bring this interlocutory appeal.⁹¹

86. Willner v. State, 602 N.E.2d 507, 509 (Ind. 1992).

87. Willner v. State, 588 N.E.2d 581, 582 (Ind. Ct. App. 1992).

88. *Id.* at 584.

89. 602 N.E.2d at 509.

90. Board of Comm'r of Lake County v. Foster, 614 N.E.2d 949, 950 (Ind. Ct. App. 1993).

91. *Id.*; see also Harkrider v. Lafayette Nat'l Bank, 613 N.E.2d 36 (Ind. Ct. App. 1993) (appeal dismissed and appellate attorneys' fees awarded); *id.* at 45-46 (Conover, J., concurring in result) (suggesting civil penalty of \$150,000 in addition to appellate attorneys' fees).

The appellate rule specifying when to file the praecipe in permissive interlocutory appeals had been substantially clarified by amendments effective January 1, 1992.⁹²

In another case, this one an appeal from the Review Board of the Indiana Department of Employment and Training Services, the court of appeals dismissed the appeal for failing to include an assignment of errors in the record.⁹³ For appellate review of administrative decisions taken directly to the court of appeals, the record of proceedings must include an assignment of errors.⁹⁴ The timely filing of an assignment of errors with the court of appeals is jurisdictional.⁹⁵ In addition, a specific statute provides that when appealing a decision of this board, "the appellant shall attach to the transcript an assignment of errors."⁹⁶ "Although the assignment of errors is considered a part of the record of proceedings, it does not have to be filed with the record; it may be filed separately, as long as it is filed within the time permitted by the appellate rules."⁹⁷ The court of appeals continued, "[A]n extension of time to file the record of proceedings necessarily includes an extension of time to file an assignment of errors."⁹⁸ If the appellant files no assignment of errors, however, the court of appeals will dismiss the appeal for lack of jurisdiction.⁹⁹

In a third noteworthy appellate dismissal, the trial court appointed a guardian for an individual unable to care for himself or his estate.¹⁰⁰ The court approved payment of certain expenses and ordered the Indiana Family and Social Services Administration to pay. Upon receiving the trial court's order, the Agency initiated an appeal. The Agency argued that it had not been a party and had not received any notice; therefore, the order should be vacated. "Counsel for the guardianship moved to dismiss, asserting that . . . appeals from judgments rendered in the circuit and superior courts may be taken only by those who were parties to the proceeding."¹⁰¹ The court of appeals dismissed the case.¹⁰² On transfer, the agency argued that "where a trial court orders a state agency to

92. George T. Patton, Jr., *Recent Developments in Indiana Appellate Procedure: Reforming the Procedural Path to the Indiana Supreme Court*, 25 IND. L. REV. 1105, 1107-08 (1992).

93. *South Madison Community Sch. Corp. v. Review Bd. of the Ind. Dept. of Employment & Training Serv.*, 622 N.E.2d 1042 (Ind. Ct. App. 1993).

94. IND. APP. R. 7.2(A)(1) (1993).

95. *South Madison*, 622 N.E.2d at 1043 (citing *Lashley v. Centerville-Abington Community Sch.*, 293 N.E.2d 519 (Ind. App. 1973)).

96. *Id.* (quoting IND. CODE § 22-4-17-12(f)).

97. *Id.* (citing IND. APP. R. 7.2(A)(1); *Kentucky-Indiana Mun. Power Ass'n v. Public Serv. Co. of Ind., Inc.*, 393 N.E.2d 776 (Ind. App. 1979)).

98. *Id.* (citing *Overshiner v. Indiana State Highway Comm'n*, 448 N.E.2d 1245 (Ind. Ct. App. 1983)).

99. *Id.* (citing *Indiana Bell Tel. Co. v. T.A.S.I., Inc.*, 433 N.E.2d 1195 (Ind. Ct. App. 1982)).

100. *In the Matter of the Guardianship of Coffey*, 624 N.E.2d 465 (Ind. 1993) (per curiam).

101. *Id.* at 465 (citing IND. CODE § 34-1-47-1).

102. *In the Matter of the Guardianship of Coffey*, No. 33A04-9212-CV-401 (Ind. Ct. App. June 30, 1993).

assume financial responsibility for the care and maintenance of an individual without the agency having been a party, [the] order is voidable.”¹⁰³ In a *per curiam* opinion, the Supreme Court stated:

While this represent[ed] a colorable claim of error by the trial court, counsel for the guardianship is correct that one cannot appeal a judgment entered in a proceeding in which one was not a party. [The agency] should instead present its claim to the [trial court] by way of a motion to intervene and a request for relief from judgment. From decisions on those petitions, an appeal may lie.¹⁰⁴

The Supreme Court affirmed the dismissal of the appeal.¹⁰⁵

Finally, the court of appeals dismissed an appeal in a criminal case because a master commissioner had no authority to enter a final appealable judgment of conviction in a criminal prosecution.¹⁰⁶ Quoting from an earlier decision, the court of appeals stated, “[A] commissioner acts as an instrumentality to inform and assist the court; only the court has authority to make final orders or judgments, and the decision of a commissioner is a nullity from which no appeal can be taken.”¹⁰⁷ The court of appeals dismissed the appeal and ordered the defendant discharged from the custody of the Department of Corrections and remanded to the custody of the county sheriff.¹⁰⁸

C. Interlocutory Appeal of Court Order To Sell Stock

In addressing a question of first impression, one court of appeals held that a court’s order to sell stock is interlocutorily appealable as of right.¹⁰⁹ The rule provides that an “appeal from interlocutory orders shall be taken to the Court of Appeals in the following cases: (1) . . . the delivery or assignment of any securities.”¹¹⁰ Delivery is “the act by which the res or substance thereof is placed within the actual or constructive possession or control of another.”¹¹¹ The court of appeals stated, “An interlocutory appeal is permitted when there is a delivery of securities because a shift of control occurs which may result in material changes that could not be remedied by a later appeal.”¹¹² The court concluded its analysis of this issue, “A judicial sale shifts control of the

103. *Coffey*, 624 N.E.2d at 466 (citing *Commitment of T.J.*, 614 N.E.2d 559 (Ind. Ct. App. 1993)).

104. *Id.* (citing *Metzger v. Hamp*, 156 N.E. 582 (Ind. App. 1927)).

105. *Id.*

106. *Kirby v. State*, 619 N.E.2d 967 (Ind. Ct. App. 1993).

107. *Id.* at 967 (quoting *Rivera v. State*, 601 N.E.2d 445, 446 (Ind. Ct. App. 1992)).

108. *Id.* at 968; *see also* *Boushehry v. State*, 622 N.E.2d 212 (Ind. Ct. App. 1993).

109. *Koch v. James*, 616 N.E.2d 759, 760-61 (Ind. Ct. App. 1993).

110. IND. APP. R. 4(B) (1993).

111. 616 N.E.2d at 760 (quoting BLACK’S LAW DICTIONARY 385 (5th ed. 1979)).

112. *Id.*

securities and requires a change in possession. We find 'delivery' encompasses a judicial sale of securities and is grounds for an interlocutory appeal."¹¹³

D. Compliance With The Appellate Rules

As the appellate courts point out periodically, some parties fail to comply with the procedural rules to appeal. One party filed a brief which reflected his "subjective belief" that he should not have to pay a money judgment.¹¹⁴ The court of appeals found that that brief "substantially fail[ed] to comply with the appellate rules."¹¹⁵ The court recitation of the omissions reads like a primer on appellate procedure:

We find no table of contents. His statement of the case includes only one date and no verbatim statement of the judgment. His statement of the facts is disjointed, incomplete, and without citation to the record. Ind. Appellate Rule 8.3. His issues are almost indecipherable. His argument lacks cogency, and there is little or no citation to authority. While we prefer to decide cases on the merits rather than on technicalities, we will deem alleged trial errors waived where appellant's noncompliance with the rules of procedure is so substantial it impedes our appellate consideration of the errors.¹¹⁶

The court of appeals concluded that the purpose of the appellate rules is "to aid and expedite review and to relieve the appellate court of the burden of searching the record and briefing the case."¹¹⁷ The appellate court "will not become an advocate for a party nor will [it] address argument which is either inappropriate, too poorly developed, or improperly expressed to be understood."¹¹⁸ The court was compelled to find the issues waived because "non-compliance with the appellate rules substantially impede[d] [it] from reaching the merits of this appeal."¹¹⁹

In another case, the court of appeals stated, "We note the statement of facts in Smith's appellate brief consists primarily of his argument, essentially presents only evidence in his favor, and is not a narrative statement of the facts as required by Indiana Appellate Rule 8.3(A)(5). A statement of facts is not intended to be a portion of appellant's argument."¹²⁰ The court of appeals has

113. *Id.* at 760-61.

114. *Mullis v. Martin*, 615 N.E.2d 498, 500 (Ind. Ct. App. 1993).

115. *Id.*

116. *Id.* (citing *Nehi Beverage Co. of Indianapolis v. Petri*, 537 N.E.2d 78, 81 (Ind. Ct. App. 1989), *trans. denied.*).

117. *Id.*

118. *Id.* (quoting *Terpstra v. Farmers & Merchants Bank*, 483 N.E.2d 749, 754 (Ind. Ct. App. 1985), *trans. denied.*).

119. *Id.*

120. *Smith v. State*, 610 N.E.2d 265, 267 n.2 (Ind. Ct. App. 1993) (citing *Moore v. State*, 426

also reminded counsel that “[w]hen citing decision by the Court of Appeals, no reference should be made to the individual districts.”¹²¹

Perhaps the most flagrant non-compliance with the appellate rules, however, was not by a lawyer or a party, but by a court reporter. One *per curiam* opinion of the Indiana Supreme Court opened:

The Court today is faced with the task of determining whether to find a court reporter in contempt for violating a court-ordered deadline for preparing a transcript in a death penalty case. As she prepared other transcripts instead, we find she willfully disobeyed a court order and, accordingly, she is guilty of contempt.¹²²

During the summer of 1988, the death penalty case went to trial. The defendant filed a motion to correct errors in January, 1989, and later filed a belated motion to correct errors. The trial court “denied the belated motion to correct errors about two years later, on January 17, 1990, after the Supreme Court initiated inquiry concerning the delay.”¹²³

About two years later, March 1, 1992, the trial court appointed the defendant’s counsel, who filed a praecipe for the record on March 18, 1992. The record was due on June 16, 1992. However, the Supreme Court granted a belated extension of time to file the record on July 27, 1992. Concerned over the delay in the case, the Supreme Court set a status conference for September 10, 1992.¹²⁴

The court reporter and defendant’s counsel appeared. As a result of the conference, the Supreme Court issued an order on September 15, 1992, requiring the court reporter to complete the transcript by December 10, 1992. The order expressly provided that the court reporter would have to answer for contempt charges if she did not comply with the deadline.¹²⁵

The court reporter did not complete the transcript by the due date as ordered. She appeared before the Supreme Court on January 13, 1993, to offer her reasons for not being held in contempt. Unpersuaded by her arguments, four justices of the Supreme Court found her in contempt.¹²⁶ The Supreme Court ordered a \$500 fine and seven (7) days in jail without the benefit of good time. The order of incarceration was withheld until February 1, 1993, such that if she completed the transcript by that time the Supreme Court would consider suspending her jail sentence.¹²⁷

N.E.2d 86 (Ind. Ct. App. 1981)).

121. Wenger v. Weldy, 605 N.E.2d 796, 797 n.1 (Ind. Ct. App. 1993).

122. Matter of Hatfield, 607 N.E.2d 384, 384 (Ind. 1993).

123. *Id.*

124. *Id.*

125. *Id.*

126. *Id.* at 385.

127. *Id.* at 386.

The Supreme Court also noted that the trial court judge "must share the blame for the tardy transcript preparations in his court."¹²⁸ The documents reflected a one-year backlog and "[a]s the entire appeal process often takes less than one year in cases in other trial courts, [the] delay is untenable."¹²⁹ The Supreme Court ordered the trial court to submit a plan for expeditiously resolving the one-year backlog.¹³⁰

III. ON THE HORIZON FOR INDIANA'S APPELLATE COURTS

As the state's appellate courts move toward the twenty-first century, it is appropriate to look at the future impact of some changes made or attempted in 1993. The first forward-looking change is the retirement of Justice Krahulik on November 1, 1993, and his replacement by Justice Sullivan. Although all 3-2 decisions with Justice Krahulik in the majority will have the power of stare decisis, such decisions will probably be carefully considered by Justice Sullivan whose prior public service and agency experience may shape his view of what Indiana law should be. At his swearing-in ceremony, Justice Sullivan expressed a strong interest in addressing the needs of children. Justice Sullivan handed down his first opinion for the court on December 27, 1993 holding "a child support obligation is enforceable by contempt."¹³¹

Another change is the Indiana Rules of Evidence which go into effect January 1, 1994.¹³² One can anticipate that the appellate courts will adopt standards of review that give trial courts less discretion to move away from the written rules that were so carefully drafted over many months of review by professors, practitioners, and judges from all levels. The appellate courts may look to federal law for assistance in addressing the issues that the new Indiana Rules of Evidence will present in the coming years.

A third and final stirring for the future is the attempt to shift in the first instance appellate review of the Indiana Tax Court from the Indiana Supreme Court to the Indiana Court of Appeals. Although this effort failed, the desire to have a mandatory review of the tax court's decision by a multi-member appellate panel will probably persist. In summary, Indiana appellate procedure continued to develop in 1993. More changes are anticipated in 1994. The changes discussed here are only a beginning. The Indiana Supreme Court will continue to refine the rules of appellate procedure to make the process better, faster, and easier.

128. *Id.*

129. *Id.*

130. *Id.*

131. *Pettit v. Pettit*, 626 N.E.2d 444, 444 (Ind. 1993).

132. The initial citation format for the new rules of evidence is, for example, "Ind. Evidence Rule 301" with subsequent citations as "EVID. R. 301." IND. APP. R. 8.2(B)(2) (effective Jan. 21, 1994).

THE “GAY ’90S” — SEXUAL ORIENTATION AND INDIANA LAW

JOHN W. BARKER*

SHEILA KENNEDY**

INTRODUCTION

This Article surveys current law affecting gay men and lesbians in Indiana. Federal, statutory, and administrative law is included where it affects Indiana residents. Legal issues raised by HIV/AIDS have been treated exhaustively elsewhere, and will be discussed only when they implicate sexual orientation.

The goal of this article is to assist practitioners who represent gay and lesbian clients, to determine appropriate avenues for further research, and to identify relevant issues.

I. FEDERAL LAW

A. *Immigration*

The Immigration Act of 1990 removes an alien’s homosexuality as a bar to immigrating to the United States by eliminating the phrase “sexual deviance” from the list of permissible reasons to exclude aliens.¹ However, it is arguable that gay men may still be excluded because they constitute a high risk group for contracting HIV/AIDS,² which is on the list of contagious diseases for which infected aliens may be excluded.³ The current U.S. policy of excluding HIV-positive aliens arguably provides a rational basis for the Public Health Service’s examining physicians to exclude homosexuals who, although not HIV-positive, are at a high risk of becoming HIV-positive.⁴

* Vice President, Membership and Program, Indiana Civil Liberties Union Gay and Lesbian Task Force. J.D., 1989, Tulane University Law School.

** Executive Director, Indiana Civil Liberties Union. J.D., 1975, Indiana University School of Law.

1. Lyn G. Shoop, *Health Based Exclusion Grounds in United States Immigration Policy: Homosexuals, HIV Infection and the Medical Examination of Aliens*, 9 J. CONTEMP. HEALTH L. & POL’Y, 521, 526 (1993). See generally 8 U.S.C.A. §§ 1151, 1182, 1224, 1226, 1251, 1252, 1254, 1427, 1440 (West Supp. 1993).

2. See Shoop, *supra* note 1, at 521: “The nexus between HIV and homosexuality, however, raises questions as to the immigration status of homosexuals and other persons seeking entry into the United States who, although not infected, are at a high risk of contracting HIV.”

3. *Id.* at 521 (citing 42 C.F.R. § 34).

4. *Id.* at 530-44. See also 42 C.F.R. § 34 (1992).

B. Employment Discrimination

No federal statute specifically prohibits employment discrimination on the basis of sexual orientation. The Americans with Disabilities Act of 1990 offers gay men and lesbians no protection against job discrimination on the basis of sexual orientation.⁵ The regulations promulgated pursuant to the Americans with Disabilities Act expressly provide that the "phrase physical or mental impairment does not include homosexuality"⁶ Furthermore, Title VII of the Civil Rights Act of 1964 does not prohibit employment discrimination against gay and lesbian employees.⁷ Section 706 of the Rehabilitation Act also excludes homosexuality from its coverage.⁸

The Employee Polygraph Protection Act of 1988 prohibits most private employers from using lie detector tests either for pre-employment screening or for testing during the course of employment.⁹ Federal, state, and local government employers, however, are exempt.¹⁰ Section 8(b) of the Act, and Department of Labor regulations, require that a polygraph examinee be informed before the exam that questions concerning sexual preference or behavior are prohibited.¹¹ During all phases of the polygraph testing, no questions may be asked about sexual preference or behavior.¹²

Several federal agencies now ban employment discrimination based on sexual orientation, including the Justice Department, the Department of Agriculture, the General Services Administration, and the Department of Transportation, and several regional offices of the National Park Service.¹³ Because these changes are fairly recent, the scope of protection they afford is unclear at this time.

5. 42 U.S.C.A. §§ 12101-12213 (West Supp. 1993); 47 U.S.C.A. §§ 225, 611 (West Supp. 1993).

6. 28 C.F.R. § 35.104; 28 C.F.R. § 35, App. A; 28 C.F.R. § 36.104; 28 C.F.R. § 36, App. B (1993); 29 C.F.R. § 1630.3 (1993).

7. *Smith v. Liberty Mut. Ins. Co.*, 569 F.2d 325, 326-27 (5th Cir. 1978). *See also* *Williamson v. A.G. Edwards & Sons, Inc.*, 876 F.2d 69 (8th Cir. 1989), *cert. denied*, 493 U.S. 1089 (1990); *Ulane v. Eastern Airlines, Inc.*, 742 F.2d 1081 (7th Cir. Ill. 1984), *cert. denied*, 471 U.S. 1017 (1985); *DeSantis v. Pacific Tel. & Tel. Co.*, 608 F.2d 327 (9th Cir. 1979); *Polly v. Houston Lighting & Power Co.*, 825 F. Supp. 135 (S.D. Tex. 1993).

8. *Blackwell v. United States Dept. of Treasury*, 830 F.2d 1183 (D.C. Cir. 1987). *See also* 29 U.S.C.A. §§ 701-797 (West Supp. 1993); 28 C.F.R. § 35, App. A; 28 C.F.R. § 36, App. B (1993).

9. Employee Polygraph Protection Act of 1988, 29 U.S.C.A. 2001-2009 (West Supp. 1993).

10. 29 C.F.R. § 801.1 (1993).

11. 29 C.F.R. § 801, App. A (1993).

12. 29 C.F.R. § 801.22(b)(iv) (1993).

13. Gary Lee, *Secretary Pena Celebrates Gay Pride*, WASH. POST, June 16, 1993, at A19; Al Kamen, *Helms on Nominee: "She's a Damn Lesbian,"* WASH. POST, May 7, 1993, at A21; Gary Lee, *Beyond Military, Gays Seek Acceptance in Government Workplace*, WASH. POST, April 12, 1993, at A17; Joan Biskupic, *Reno Prohibits Bias Against Gays in Security Clearances*, WASH. POST, Dec. 3, 1993, at A04.

C. Criminal Law

Most of the legal issues in criminal law that involve the rights of gay men and lesbians arise at the state level. At the federal level, however, it should be noted that the regulations under the Bureau of Prisons of the Department of Justice state that in determining whether an inmate should be placed in a control unit, the warden may not do so on the basis that "the inmate is a protection case, e.g., a homosexual, . . . unless the inmate meets other criteria" as described in other parts of the regulation.¹⁴

D. HIV/AIDS

An individual who is HIV-positive or who has AIDS, or who simply is perceived as being HIV-positive or as having AIDS, can seek remedies under the Americans with Disabilities Act of 1990¹⁵ and the Rehabilitation Act of 1973.¹⁶

II. STATE LAW

A. Family Law

1. *Definition of Family.*—Indiana statutes generally define a "family" on the basis of biological connections or legally sanctioned exceptions to those biological connections. For example, the Indiana Code defines "member of the family" as "a spouse, parent, father-in-law, mother-in-law, child, son-in-law, daughter-in-law, grandparent, grandchild, brother, sister, brother-in-law, sister-in-law, uncle, aunt, nephew, niece, or first cousin."¹⁷ A parent, child, sibling, or first cousin usually is related to a person by blood. A relationship of father-in-law or spouse is a relationship based not on blood but on a legally created relationship.¹⁸ Indiana law does create a "blood" relationship between persons not related by blood, but only in the context of a traditional family. For example, an adopted child is the equivalent of a natural child.¹⁹

14. 28 C.F.R. § 541.41(c)(2) (1993).

15. See *supra* note 5.

16. See *supra* note 8. See also *Glover v. ENCOR*, 867 F.2d 461 (8th Cir. 1989); *Chalk v. United States Dist. Ct.*, 840 F.2d 701 (9th Cir. 1988); *Martinez v. School Bd. of Hilborough Cty*, 861 F.2d 1502 (11th Cir. 1988); *Baxter v. City of Belleville*, 720 F. Supp. 720 (S.D. Ill. 1989); *Thomas v. Atascadero Unified Sch. Dist.*, 662 F. Supp. 376 (C.D. Cal. 1987). See also Paul Chase, *HIV/AIDS Discrimination in Indiana: Nature, Extent and Remedies for Redress* (Oct. 16, 1993) (material prepared for a CLE program, "Sexual Orientation and Indiana Law," on file with the Indiana Civil Liberties Union).

17. IND. CODE § 4-31-13-5(a) (1993).

18. For other definitions of "family," see the following statutes: IND. CODE §§ 2-7-1-5, 9-13-2-43, 12-7-2-111, 14-3-3.2-18 and 30-2-8.5-9 (1993).

19. See IND. CODE § 31-3-1-9 (1993) (adoptive parents become the natural parents under the

Indiana statutorily encourages the formation of traditional families and discourages the formation of non-traditional families through the various definitions of "family" and the benefits extended to family members. Another example of this policy appears in the provisions regarding AIDS education. Information distributed to young adults and school children regarding AIDS prevention must encourage sexual abstinence until the school children or young adults marry.²⁰

Issues which seem routine for traditional families can become quite complicated for the non-traditional families formed by gay and lesbian couples. Gay men and lesbians must therefore use legal creativity in attempting to establish rights which are statutorily granted to traditional family members. Some of the creative legal devices include, but are not limited to, the domestic partnership agreement, the power of attorney, and the living will.

2. *Domestic Relations.*—

a. *Marriage*

The Indiana Code specifically prohibits same-sex marriages.²¹ By prohibiting same-sex marriages, Indiana denies to same-sex "spousal equivalents" the benefits of marriage, including the marital deduction,²² spousal inheritance rights,²³ and employee benefits,²⁴ including employer-provided health insurance, pension and death benefits,²⁵ relocation expenses,²⁶ trips,²⁷ employee

law). See also IND. CODE §§ 29-1-6-11, 6-4.1-1-3, 27-8-5-21, 29-1-2-8, 29-1-3-8, and 31-1-11.7-2 (1993).

20. IND. CODE §§ 16-41-4-1, 20-10.1-4-11, and 20-8.1-7-21 (1993).

21. IND. CODE § 31-7-1-2 (1993). The following states also statutorily prohibit same-sex marriages: Louisiana: LA. CIV. CODE ANN. art. 89, art. 94, art. 96 (West 1992); Texas: TEX. FAM. CODE ANN. § 1.01 (West 1993); Utah: UTAH CODE ANN. § 30-1-2 (1993) (amended to repeal prohibition against marriage with person infected with HIV/AIDS by 1993 Utah Laws 2nd Sp. Sess. Ch. 14 (S.B. 6)); Virginia: VA. CODE ANN. § 20-45.2 (Michie 1993).

22. See 26 U.S.C.A. § 2056 (West Supp. 1993).

23. See IND. CODE §§ 29-1-6-1 and 29-1-4-1 (1993). See also IND. CODE § 6-4.1-3-7 (1993) (regarding the exemption from inheritance taxes on gifts to spouses).

24. Heidi A. Sorensen, *A New Gay Rights Agenda? Dynamic Statutory Interpretation and Sexual Orientation Discrimination*, 81 GEO. L.J. 2105 (1993). See 42 U.S.C.A. § 1382 (West Supp. 1993) (social security benefits for a spouse).

25. *Rovira v. AT & T*, 817 F. Supp. 1062 (S.D. N.Y. 1993) (deceased employee's gay life partner could not collect under employer's death benefit plan because partner was not a spouse under ERISA). See also IND. CODE § 5-10-10-6 (1993) (special death benefit to surviving spouse of public safety officer who dies in the line of duty); IND. CODE § 36-8-7.5-14.1 (1993) (additional monthly benefit for surviving spouse of police officer who died in line of duty); IND. CODE § 5-10-11-5 (1993) (state employee's death benefit for surviving spouse). See 45 U.S.C.A. § 231a (West Supp. 1993) (surviving spouse's annuity under Railroad Retirement Act of 1974). See 38 U.S.C.A. § 1713 (West 1991 & Supp. 1993) (medical care for veterans' surviving spouses).

26. See IND. CODE § 5-10-7-5 (1993) (travel and relocation expenses for public employees

discounts, reduced tuition,²⁸ club memberships and similar employee perks. Gay men and lesbians must resort to other legal means to obtain some of the practical benefits of marriage. Denial of such benefits means that gay workers are receiving less total compensation than their married counterparts in the work force.

Two trends have emerged in response to this obvious inequity: legislative initiatives (almost exclusively at the municipal level) and contractual or private employer responses.

b. Domestic partnerships

(i) Legislative provisions

Municipalities in California (Berkeley, San Francisco, West Hollywood, and Santa Cruz), Washington (Seattle), New York (New York), and the District of Columbia extend certain benefits to unmarried individuals' "spousal equivalents."²⁹ In several of these municipalities, the partners must register as a domestic partnership to receive benefits. The benefits range from leave to care for an ill partner to health and dental benefits. In many instances, the majority of couples filing as domestic partnerships are heterosexual.³⁰ As of this writing, no state has extended health care coverage to domestic partners of its employees.

(ii) Private employers

As the labor market has tightened, particularly in fields where employers compete for employees with specific skills, the ability of homosexual employees to obtain parity with their heterosexual colleagues is growing.³¹ As more employers examine the experience of companies which have previously extended such benefits, and find that costs are equal to or even somewhat below the costs of benefits to married persons, the trend has grown.³² In part, the willingness

and their immediate families). See also 5 U.S.C.A. § 5724, 5 U.S.C.A. § 5724b and 29 U.S.C.A. § 1662e (West Supp. 1993) (relocation allowances, credits, and reimbursement for federal employees and their families).

27. See *supra* note 26.

28. See IND. CODE § 20-12-19.5-1 (1993) (tuition waiver for surviving spouse of deceased firefighter or police officer).

29. For a full discussion of these ordinances, see Note, *Domestic Partnership Recognition in the Workplace: Equitable Employee Benefits for Gay Couples (and Others)*, 51 OHIO ST. L.J. 1067. See also Note, *A More Perfect Union: A Legal and Social Analysis of Domestic Partnership Ordinances*, 92 COLUM. L. REV. 1164 (1992).

30. Bettina Boxall, *Benefits for Unmarried Partners Lauded*, LOS ANGELES TIMES, Nov. 17, 1993, at B4.

31. *Id.*

32. *Id.*

to offer benefits recognizes that benefits make up an average of 37% of an employee's compensation.³³ Thus, employees who cannot include their partners in those benefits are compensated less than those who can. Most human resources professionals expect the trend to extend benefits to domestic partners to accelerate.³⁴

(iii) *Private partnership agreements*

Finally, in the absence of legislation or action by private employers, many couples in non-traditional relationships are choosing to formalize those relationships through the execution of partnership agreements. No case law in Indiana specifically addresses the validity of partnership agreements substituting for marriage contracts. In general, however, courts have given effect to the desires of parties to general partnership agreements in the absence of countervailing public policy concerns. In a number of jurisdictions, courts have implied domestic partnership contracts from the behavior of unmarried parties, although generally such cases have dealt with opposite-sex cohabitants.³⁵

Indiana has adopted the Uniform Partnership Act (UPA).³⁶ It defines a partnership as "an association of two or more persons to carry on as co-owners a business for profit."³⁷ While a "domestic partnership" agreement may include recitation of such a business purpose, it is certainly possible that a court would find such a recitation disingenuous and thus find the partnership invalid under the UPA. Even if this were the result, however, it seems likely that a court would still give effect to the agreement under general contract principles. Assuming applicability of the UPA, parties should be thoroughly advised of the Act's effect, particularly with respect to issues of liability and taxation.

Depending upon the desires of the parties and their circumstances, partnership agreements may include provisions as diverse as responsibility for household chores, child care, division of employment benefits, and execution of further documents and agreements. Unlike a marriage contract, a partnership agreement which allows one partner to inherit property or to make health care decisions for the other will not be valid. Partnership agreements, therefore, should be part of a carefully constructed package of documents that includes, at a minimum, a durable power of attorney and a will.

33. *Id.*

34. See Barbara J. Cox, *Alternative Families: Obtaining Traditional Family Benefits Through Litigation, Legislation and Collective Bargaining*, 2 WIS. WOMEN'S L.J. 1 (1986); see David J. Jefferson, *Family Matters: Gay Employees Win Benefits for Partners at More Corporations*, WALL ST. J., March 18, 1994, at A1.

35. *Beal v. Beal*, 577 P.2d 507 (Or. 1977); *Wilbur v. DeLapp*, 850 P.2d 1151 (Or. Ct. App. 1993); *Raimer v. Wheeler*, 849 P.2d 1122 (Or. Ct. App. 1993); *Hinkle v. McColm*, 575 P.2d 711 (Wash. 1978).

36. IND. CODE § 23-4-1 (1993).

37. IND. CODE § 23-4-1-6(1) (1993).

c. Power of attorney

In the traditional power of attorney, a principal delegates powers to a person, called the attorney-in-fact, to act on his or her behalf.³⁸ A durable power of attorney is a specialized power of attorney because it survives the principal's incompetence.³⁹ An area in which the durable power of attorney is very helpful is in health care, though the usefulness of this instrument extends to many other aspects of domestic relations.

Health care may be administered to a patient only if that person consents to the care.⁴⁰ "A competent person may consent to or refuse to consent for medical treatment, including life-prolonging procedures."⁴¹ A patient in a vegetative state would be unable to consent to a medical procedure or refuse consent to a life-prolonging procedure. If a person is incompetent and unable to consent or refuse consent, the Indiana Code provides that, in the absence of a health care representative, the incompetent person's "spouse, parent, . . . adult child, or . . . adult sibling" may provide or refuse the consent, unless disqualified.⁴²

Many gay men or lesbians are involved in relationships and consider their same-sex lover a spouse. However, because gay men and lesbians may not marry, the same-sex lover is not a spouse in the eyes of the law and thus is unable to consent or refuse consent on that person's behalf. Biological families sometimes are alienated from their gay and lesbian relatives on the basis of their relatives' sexual orientation and thus might not act in the gay or lesbian individual's best interest regarding health care, especially the use of heroic measures to prolong life.

Gay men and lesbians do have the option of disqualifying their biological relatives⁴³ and appointing their same-sex lover, a trusted friend, or even a biological relative, as their health care representative, which is a special application of the durable power of attorney.⁴⁴ The appointment may confer upon the health care representative general authority and/or provide detailed instructions about health care decisions.⁴⁵ The health care representative may even be granted the power to refuse consent to medical treatment on the gay or lesbian person's behalf.⁴⁶

The gay or lesbian individual may execute a power of attorney for reasons other than health care. During the period of a person's incompetency, the

38. IND. CODE § 30-5-2-2 (1993).

39. IND. CODE § 29-3-1-5 (1993).

40. IND. CODE § 16-36-4-6 (1993).

41. IND. CODE § 16-36-4-7(a) (1993).

42. IND. CODE § 16-36-1-5 (1993).

43. IND. CODE § 16-36-1-9 (1993).

44. IND. CODE §§ 16-36-1-14, 30-5-5-17 (1993).

45. IND. CODE § 30-5-5-16 (1993).

46. IND. CODE § 30-5-5-17 (1993).

attorney-in-fact may exercise power granted by the principal to take care of general business transactions, such as paying bills or depositing checks.⁴⁷

d. Living wills

The gay or lesbian person also has the option of executing a living will declaration to specify intent regarding the use of life-prolonging procedures.⁴⁸ The living will is "presumptive evidence of the patient's desires concerning the use, withholding, or withdrawal of life prolonging procedures" and "shall be given great weight by the physician in determining the intent of the patient who is mentally incompetent."⁴⁹ A physician relying on an individual's living will is not required to use or withdraw life-prolonging procedures, and still has discretion to direct the course of treatment.⁵⁰ An individual may also execute a "life prolonging procedures will declaration" which "does require the physician to use life-prolonging procedures as requested."⁵¹

It is important to note that the state's definition of "life-prolonging procedure" does not include the "provision of appropriate nutrition and hydration."⁵² Hence, the execution of a living will does not automatically direct the physician to cease providing nutrition and hydration to the patient. This issue must therefore be addressed by the health care representative via the durable power of attorney. Additionally, the individual executing the living will could specify his or her intent regarding cessation of artificial nutrition and hydration.

Effective July 1, 1994, pursuant to Indiana Public Law 99-1994, a person may specify in his living will declaration the desire not to receive artificially supplied nutrition and hydration if the "effort to sustain life is futile or excessively burdensome" to the declarant.⁵³ This amendment expressly does not apply to living wills executed before July 1, 1994.⁵⁴

3. *Child Custody*.—Following dissolution of marriage, in determining which parent should have custody of a child of the marriage, the trial or divorce court must award custody in the "best interests of the child with no presumption favoring either parent."⁵⁵ In a custody dispute between a heterosexual parent and a gay or lesbian parent, it would follow that there could be no presumption

47. IND. CODE § 30-5-5 (1993).

48. IND. CODE § 16-36 (1993). See also Charles P. Sabatino, *Health Care Advance Directives: Drafting Sound Legal Documents That Reflect How Decisions Are Really Made*, 16 FAM. ADVOC. 60 (1993); Rhonda R. Rivera, *Current Legal Issues in AIDS: Lawyers, Clients and AIDS: Some Notes From the Trenches*, 49 OHIO ST. L.J. 883 (1989).

49. IND. CODE § 16-36-4-8(f) (1993).

50. IND. CODE § 16-36-4-8(f)(1) (1993).

51. IND. CODE § 16-36-4-8(g) (1993).

52. IND. CODE § 16-36-4-1(b)(1) (1993).

53. 1994 Ind. Legis. Serv. P.L. 99-1994 (H.E.A. 1037) (West).

54. *Id.*

55. IND. CODE § 31-1-11.5-21 (1993).

favoring the heterosexual parent simply because the other parent is a gay man or a lesbian. In awarding custody, the court "shall consider all relevant factors," including the following six factors:

(1) the age and sex of the child; (2) the wishes of the child's parent or parents; (3) the wishes of the child; (4) the interaction and interrelationship of the child with his parent or parents, his siblings, and any other person who may significantly affect the child's best interests; (5) the child's adjustment to his home, school, and community; and (6) the mental and physical health of all individuals involved.⁵⁶

In *D.H. v. J.H.*, the Indiana Court of Appeals for the First District held that evidence of a parent's homosexuality is relevant to a child custody determination,⁵⁷ even though the statute does not specifically state that homosexuality is relevant.⁵⁸ The court noted that "[c]onsideration of all relevant factors is not limited to [the six factors] specifically enumerated."⁵⁹ The court held that "homosexuality standing alone without evidence of any adverse effect upon the welfare of the child does not render the homosexual parent unfit as a matter of law to have custody of the child."⁶⁰ Homosexual activity in the presence of the child, or evidence that the parent's homosexuality has an adverse impact on the child, probably would preclude custody.⁶¹

The question becomes what acts a court would consider to be homosexual activity. An embrace between members of a heterosexual couple might be seen as inoffensive non-sexual activity, whereas a hug or kiss between members of a homosexual couple might be seen as sexual activity. Such innocuous acts might then form the basis for denying custody to the homosexual parent.

Apart from the question of whether a parent's homosexuality is a relevant factor standing alone, sexual orientation could negatively affect the court's determination under the six specific factors. Any such negative effect could result in an unreviewable denial of custody because an appellate court, recognizing the fact-sensitive nature of the determination, will not disturb a trial court's award of custody in the absence of an abuse of discretion.⁶² Thus, the outcome of a court's application of sexual orientation to its consideration of the six factors could have far-reaching effects.

The first factor requires that the court consider the age and sex of the child. At first glance this factor appears unaffected by a parent's sexual orientation. However, faced with a gay or lesbian parent, the court might weigh the age and

56. *Id.*

57. 418 N.E.2d 286, 290-94 (Ind. Ct. App. 1981).

58. IND. CODE § 31-1-11.5-21 (1993).

59. *D.H.*, 418 N.E.2d at 290-91.

60. *Id.* at 293.

61. *Id.*

62. *Aylward v. Aylward*, 592 N.E.2d 1247, 1250-52 (Ind. Ct. App. 1992).

sex of the child differently than if both parents were heterosexual. For example, a court might state that a very young son should not be placed with a gay father or that a very young daughter should not be placed with a lesbian mother because it is in the best interest of children to have heterosexual role models.

In considering the second factor, the wishes of either parent, the court's negative attitudes about homosexuality could operate against the gay or lesbian parent. For example, a trial court might use the heterosexual parent's negative attitudes regarding the other parent's homosexuality against the gay or lesbian parent.

Third, the court must also consider any other person who may significantly affect the child's best interests. "Any other person" is very broad. Certainly the "other person" would include the gay or lesbian parent's same-sex lover.

In considering the fourth factor, the interaction of the child with others, the trial court might also find relevant whether the same-sex lover lives with the gay or lesbian parent or frequently stays overnight in the parent's home. For example, one Indiana appellate court has held that a trial court did not abuse its discretion in ordering that during the period when the child visited the non-custodial gay father, the father's adult male lover could not be present overnight.⁶³ The mere existence of the same-sex lover—regardless of whether the same-sex lover visits or lives with the gay or lesbian parent—might serve as a basis for a trial court denying custody to the gay or lesbian parent.

Fifth, the court must also consider the child's adjustment to the home, the school, and the community. In applying this factor a trial court might award custody to the heterosexual parent so the child would avoid experiencing society's prejudice against homosexuality. For example, if the community knows of the sexual orientation of the gay or lesbian parent, and views it negatively, a trial court might argue that such prejudice would not be in the best interest of the child.

Finally, in considering the health of all individuals involved, HIV/AIDS issues could arise, although their effect on the determination is unclear. For example, a trial court denied a change of custody petition and furthermore terminated the visitation rights of a father with AIDS on the ground that doing so was necessary to prevent the child's being exposed to AIDS.⁶⁴ The Court of Appeals upheld the trial court's denial of change of custody, but held that the termination of visitation rights constituted an abuse of discretion.⁶⁵ The role of HIV/AIDS in child custody and visitation issues is at best unclear.

Furthermore, a gay or lesbian parent might not be HIV-positive, but instead might be perceived as HIV-positive simply because the parent is homosexual. Prejudice against HIV/AIDS has sometimes led to violence against persons living with AIDS. The court might find that this prejudice would NOT be in the

63. *Pennington v. Pennington*, 596 N.E.2d 305, 307 (Ind. Ct. App. 1992).

64. *Stewart v. Stewart*, 521 N.E.2d 956, 959 (Ind. Ct. App. 1988).

65. *Id.* at 959, 966.

child's best interest. The taunting at school and the potential violence might endanger the child's mental or physical health. A court might use that prejudice against the gay or lesbian parent in determining custody.

The issues raised by examining homosexuality in the context of the child custody statutes need further study and eventual legislative reform. Judges should retain discretion, and the determination should remain fact-sensitive. However, the discretion must be exercised with adequate information about sexual orientation issues. Judges and attorneys must have a thorough understanding of what issues can arise and must be sensitive to the humanity of gay and lesbian persons.

4. *Adoption of Children.*—There are many different situations in which the issue of adoption of children can arise for gay men and lesbians in Indiana. A gay man or lesbian might wish to adopt a child. A couple consisting of two gay men or of two lesbians may wish to jointly adopt a child. The same-sex partner in a same-sex relationship might wish to adopt the other partner's natural child from a previous heterosexual relationship.

Indiana statutes are silent about the issue of gay and lesbian adoptive parents, unlike the statutes of some other states, which expressly forbid adoption of children by gay men and lesbians.⁶⁶ Indiana statutes neither forbid nor expressly authorize the adoption of children by gay men and lesbians. However, it does not follow that adoption of children by gay men and lesbians is without problems.

"Any resident of Indiana desirous of adopting any child less than eighteen (18) years of age" may petition the appropriate court to adopt a child.⁶⁷ The phrase "any resident" on its face certainly does not exclude gay men and lesbians residing in Indiana. The Indiana Code states that the petition shall specify "such additional information consistent with the purpose and provisions of this chapter as may be deemed relevant to the proceedings"⁶⁸ The Code requires that before and/or after the filing of the adoption petition, a licensed child-placing agency or a county office of family and children must provide supervision.⁶⁹ This period of supervision would probably reveal the parents' sexual orientation. The petitioner must submit a copy of the petition to any sponsoring agency involved in the adoption, and a copy to the division of family and children.⁷⁰ The county office of family and children must also receive a copy if a subsidy is requested in a petition sponsored by a private agency.⁷¹ Sixty days after receiving the petition, the agency must submit to the court a report on whether

66. *E.g.*, Florida: FLA. STAT. ANN. § 63.042(3) (West 1992); New Hampshire: N.H. REV. STAT. ANN. §§ 170-B:4 and 170-F:6(I) (1992).

67. IND. CODE § 31-3-1-1 (1993).

68. IND. CODE § 31-3-1-2 (1993).

69. IND. CODE § 31-3-1-3 (1993).

70. IND. CODE § 31-3-1-4(b) (1993).

71. *Id.*

the adoption is advisable.⁷² Among other factors, the report must discuss the "suitability of the proposed home for the child or children."⁷³ The report is not binding on the court but is only advisory.⁷⁴ Hence, if an agency report recommends adoption by the gay or lesbian parent or parents, the court may reject it, or vice versa.⁷⁵ The court or the involved agencies could find the home not suitable and the adoption inadvisable solely because of the parent or parents' sexual orientation.

Although sexual orientation is not an automatic bar to adoption of children in Indiana, the negative attitudes of courts and agencies involved in the adoption process could prevent adoption of children by gay men and lesbians. Furthermore, HIV/AIDS issues could prevent an adoption or even be a basis for a biological parent to withdraw consent to an adoption.⁷⁶

B. Employment Discrimination

1. Employment-at-Will Doctrine.—Indiana law presumes that an employee is an employee-at-will when the employment is not for a specific duration.⁷⁷ Thus, the employee may be discharged at any time and for any reason.⁷⁸ A private employer has no duty of good faith and fair dealing to an employee-at-will.⁷⁹ At-will employees have no protectable property interest in their employment.⁸⁰ Such employment is not protected by the Due Process Clause of the Fourteenth Amendment to the United States Constitution.⁸¹ An employee handbook offers no exception to the employment-at-will doctrine unless the handbook somehow states that the employment is for a definite term or makes that term capable of determination.⁸² Even if there were an employment contract or employee handbook which stated that the employer would not dismiss the employee because of sexual orientation, the employee still would be considered an employee-at-will in the absence of a contractual provision specifying a definite term of employment.⁸³ Even if the employment contract

72. IND. CODE § 31-3-1-4(d) (1993).

73. IND. CODE § 31-3-1-4(e) (1993).

74. IND. CODE § 31-3-1-4(g) (1993).

75. *Id.*

76. *Matter of Adoption of Johnson*, 612 N.E.2d 569 (Ind. Ct. App. 1993).

77. *Stivers v. Stevens*, 581 N.E.2d 1253, 1254 (Ind. Ct. App. 1991).

78. *Id.*

79. *Mehling v. Dubois County Farm Bureau Coop. Ass'n*, 601 N.E.2d 5, 9 (Ind. Ct. App. 1992) (citing *Hamblen v. Danners, Inc.*, 478 N.E.2d 926, 929 (Ind. Ct. App. 1985)).

80. *Tri-City Comprehensive Community Mental Health Ctr. v. Franklin*, 498 N.E.2d 1303, 1305 (Ind. Ct. App. 1986).

81. *Id.* The 14th Amendment provides in part that "[n]o State . . . shall deprive any person of life, liberty, or property without due process of law." U.S. CONST. amend. XIV.

82. *Id.* at 1305-06.

83. See generally *Streckfus v. Gardenside Terrace Coop.*, 481 N.E.2d 423 (Ind. Ct. App. 1985), *vacated*, 504 N.E.2d 273 (Ind. 1987).

states that an employee will be discharged only "for cause," the employment is still terminable at the will of the employer if the contract fails to state a definite term of employment.⁸⁴

It is reasonably certain, therefore, that a private employer in Indiana may discharge an employee because the employee is gay or lesbian or even expresses opinions about being gay or lesbian, regardless of how well the employee performs. First Amendment protection of freedom of speech, insulating an employee from discharge for expressing opinions about homosexuality, attach only if there is state action.⁸⁵ Hence, a private employer may dismiss an employee solely for expressing an opinion about homosexuality with which the employer disagrees.

2. *First Amendment Protections for Public Employees.*—A public employee may not be discharged for expressing political opinions, as long as three conditions are fulfilled.⁸⁶ The first condition is that "the employee must be speaking on a matter of public concern about which free and open debate is vital to the decisionmaking of the community."⁸⁷ The second condition is that the public employee's interest as a citizen in expressing opinions about matters of public concern must be balanced against the public employer's interest "in running an efficient operation."⁸⁸ The third and final condition is that "the employee's protected conduct must be a motivating factor" in the employer's decision to terminate the person's employment.⁸⁹

Each of these determinations is fact-sensitive. Gay or lesbian public employees discharged for expressing opinions about sexual orientation must first prove that their statements are a matter of public concern, proof of which would depend upon the statement's context, form, and content.⁹⁰ The statement could not be one of purely personal interest to the employee⁹¹ but instead would have to be one of public concern.⁹² Speech encouraging the use of the political process to improve the legal status of gay men and lesbians certainly would be a matter of public concern, for which free and open debate is essential.⁹³

The second condition, balancing the employee's and the public employer's interests, also would be fact-sensitive. Arguably, the relatively poor legal status of gay men and lesbians affects them so intimately that the gay or lesbian

84. *Streckfus*, 481 N.E.2d at 425.

85. See generally *Rozier v. St. Mary's Hosp.*, 411 N.E.2d 50 (Ill. App. 1980).

86. *Indiana Dep't of Highways v. Dixon*, 541 N.E.2d 877, 880-881 (Ind. 1989) (citing *Pickering v. Board of Educ.*, 391 U.S. 563 (1968)).

87. *Dixon*, 541 N.E.2d at 881.

88. *Id.*

89. *Id.*

90. *Campbell v. Porter County Bd. of Comm'r*, 565 N.E.2d 1164, 1167 (Ind. Ct. App. 1991).

91. *Id.* at 1168.

92. *Lach v. Lake County*, 621 N.E.2d 357, 359 (Ind. Ct. App. 1993) (desire to effect political change through the political process is protected by the First Amendment).

93. *Id.*

employee's interest outweighs the public employer's interest in an efficient workplace. However, an employer might argue that the expression of opinions about such a controversial topic reduces morale to such an extent that the employer's interest outweighs the employee's interest.

Fulfillment of the third condition, that the employee's protected conduct prompted the termination, also depends upon the facts. The employee might have to prove this element through comments made by other employees and the employer, as well as memoranda and other documents.

3. *The Indiana Civil Rights Commission.*—The Indiana Civil Rights Commission has the power to remedy discrimination based on race, religion, national origin, familial status, and handicap. It is charged with enforcing the Indiana Civil Rights Law, the law regarding Employment Discrimination Against Disabled Persons, and the Indiana Fair Housing Act.⁹⁴ Since discrimination based on sexual orientation is not one of the discriminatory practices within the Commission's enforcement powers, a gay or lesbian employee dismissed from employment on the basis of sexual orientation may not find any remedies there.

However, sexual orientation *can* become a basis of protection because of the nexus between gay men and HIV/AIDS. The regulations promulgated by the Civil Rights Commission list HIV/AIDS as a disability.⁹⁵ An individual diagnosed with, or perceived as having, HIV disease can seek a remedy against discrimination on the basis of disability.

C. *Housing Discrimination*

In Indiana, it is legal to discriminate in housing against gay men and lesbians on the basis of their sexual orientation, unless they can show they suffered the discrimination because of having HIV/AIDS or being perceived as having HIV/AIDS. Hence, a landlord may refuse to rent to, or may evict, a tenant based on that individual's real or perceived sexual orientation. However, tort and contract claims might be available depending upon the facts.

Potential remedies for housing and employment discrimination against gay men and lesbians include amending the Indiana Civil Rights Law, the Indiana Fair Housing Act, and the Employment Discrimination Against Disabled Persons statute⁹⁶ to include sexual orientation as a basis for protection. Additionally, the remedies provided by the Indiana Civil Rights Commission should be strengthened.

The extent to which emotional and punitive damages may be recovered is not clear. Daniel B. Griffith, a staff attorney with the Indiana Civil Rights Commission, notes that many court decisions have reversed the Commission's

94. IND. CODE § 22-9-1, 22-9-5, 22-9.5 (1993).

95. IND. ADMIN. CODE tit. 910, r. 2-3-2(20)(B)(xii) (1992).

96. IND. CODE §§ 22-9-1, 22-9.5, 22-9-5 (1993).

awards of emotional and punitive damages⁹⁷ by holding that "the losses referred to in this statute are pecuniary losses which can be proved with some degree of certainty, such as where a person has been denied employment, or living accommodations, or business in violation of the Civil Rights Act where the violation results in actual pecuniary loss."⁹⁸ Title 22, section 9-1-6(k)(A) of the Indiana Code states that the commission has the authority to "restore complainant's losses incurred as a result of discriminatory treatment, as the commission may deem necessary to assure justice; however, this specific provision when applied to orders pertaining to employment shall include only wages, salary, or commissions"⁹⁹

Even if gay men and lesbians were afforded protection by the Indiana Civil Rights Commission, the denial of emotional and punitive damages for discrimination based on a person's sexual orientation is problematic. Often, only emotional and punitive damages provide sufficient motivation to change discriminatory behavior. For example, a lesbian denied an apartment because of sexual orientation arguably could find other housing. Her proof of actual pecuniary loss would be speculative, apart from compensation for the time required to find other housing. Therefore, the discriminating landlord has suffered no real loss and has no motivation to stop discriminating.

In addition, sufficient attorneys' fees should be awarded under the statutes to motivate attorneys to bring such actions on behalf of victims of sexual orientation discrimination.

Even when gay men or lesbians come within the authority of the Commission because of their real or perceived HIV-positive status, the inadequacy of remedies is still problematic. Regardless of whether the Indiana Code is amended specifically to prohibit discrimination based on sexual orientation, either the Indiana Supreme Court should hold, or a statute should provide, that emotional and punitive damages may be awarded by the Commission. Furthermore, Indiana and its municipalities should join other states in enacting legislation prohibiting sexual orientation discrimination in employment and housing.¹⁰⁰

97. *Indiana Civil Rights Comm'n v. Washburn Realtors, Inc.*, 610 N.E.2d 293 (Ind. App. 1993); *Indiana Civil Rights Comm'n v. Wellington Village Apartments*, 594 N.E.2d 518 (Ind. App. 1992), *trans. denied*; *Indiana Civil Rights Comm'n v. Union Township Trustee*, 590 N.E.2d 1119 (Ind. App. 1992), *trans. denied*; *Crutcher v. Dabis*, 582 N.E.2d 449 (Ind. App. 1991), *trans. denied*.

98. *Indiana Civil Rights Comm'n v. Holman*, 380 N.E.2d 1281, 1285 (Ind. Ct. App. 1978) (construing IND. CODE § 22-9-1-6(k)(1) (current version at IND. CODE § 22-9-1-6(k)(A) (1993)).

99. IND. CODE § 22-9-1-6(k)(A) (1993).

100. *E.g.*, CAL. LAB. CODE § 1102.1 (West 1993) (prohibiting employment discrimination based on sexual orientation); CONN. GEN. STAT. ANN. §§ 46a-81c, -81e, -81h, -81i (West 1993) (prohibiting employment and housing discrimination based on sexual orientation); MASS. GEN. LAWS ANN. ch. 151B § 4 (West 1993) (prohibiting employment and housing discrimination based on sexual orientation); MINN. STAT. ANN. § 363.03 (West 1993) (prohibiting employment and housing discrimination based on sexual orientation); N.J. STAT. ANN. § 10:5-4, -12 (West 1993) (equal rights

*D. HIV/AIDS*¹⁰¹

In general, a person may be tested for HIV only upon obtaining that person's consent or the consent of that person's representative.¹⁰² However, the individual's consent to testing is implied in a medical emergency where testing is necessary for medical treatment or diagnosis.¹⁰³ Furthermore, a court may order that a person be tested when there is clear and convincing evidence that the person represents a serious threat to others.¹⁰⁴ Another exception to obtaining consent exists when the test is done on blood collected or tested anonymously as part of an epidemiologic survey under title 16, section 41-2-3 or section 41-17-10(a)(5) of the Indiana Code.¹⁰⁵ The last exception to obtaining consent is that testing for HIV may be required upon conviction of certain crimes¹⁰⁶ or as a condition of probation.¹⁰⁷ HIV testing for persons applying for marriage licenses is voluntary.¹⁰⁸ However, the circuit court clerk must distribute AIDS information to the applicants, unless the applicants object to the information on religious grounds.¹⁰⁹

provision includes sexual orientation; employment discrimination based on sexual orientation prohibited); VT. STAT. ANN. tit. 21, § 495 (1992) (employment discrimination based on sexual orientation prohibited); WIS. STAT. ANN. §§ 101.22, 234.29 (West 1993) (equal rights provision includes sexual orientation; employment and housing discrimination based on sexual orientation prohibited).

101. IND. ADMIN. CODE tit. 760, r. 1-39-3 (1992) states that AIDS "means Acquired Immune Deficiency Syndrome and includes AIDS associated Retrovirus (ARV), Human T-Cell Lymphotropic Retrovirus Type III (HTLV-III), Lymphadenopathy Associated Virus (LAV) and Human Immunodeficiency Virus (HIV) and AIDS Related Complex (ARC)." IND. CODE § 16-18-2-171 (1993) states that HIV "refers to the human immunodeficiency virus."

102. IND. CODE § 16-41-6-1 (1993).

103. IND. CODE § 16-41-6-1(b)(1) (1993).

104. IND. CODE § 16-41-6-1(b)(2) (1993).

105. IND. CODE § 16-41-6-1(b)(3) (1993).

106. IND. CODE § 35-38-1-10.5(a) states that

the court shall order that a person undergo a screening test for the human immunodeficiency virus (HIV) if the person is: (1) convicted of a sex crime listed in section 7.1(e) of this chapter and the crime created an epidemiologically demonstrated risk of transmission of the human immunodeficiency virus (HIV) as described in section 7.1(b)(8) of this chapter; or (2) convicted of an offense related to controlled substances listed in section 7.1(f) of this chapter and the offense involved the conditions described in section 7.1(b)(9)(A) of this chapter.

IND. CODE § 35-38-1-10.5 (1993).

107. IND. CODE § 16-41-6-1(c) (1993). IND. CODE § 35-38-2-2.3(16) states that, as a condition of probation, the court may require that a person

undergo a laboratory test or series of tests approved by the state department of health to detect and confirm the presence of the human immunodeficiency virus (HIV) antigen or antibodies to the human immunodeficiency virus (HIV), if the person had been convicted of a sex crime or a controlled substance offense creating a risk of HIV transmission.

IND. CODE § 35-38-2-2.3 (1993).

108. IND. CODE § 31-7-3-3.5 (1993).

109. *Id.*

A state or local health official may ask a suspected carrier of HIV to give written consent to testing if the health official has "reasonable grounds" to believe that a person is a carrier.¹¹⁰ If the individual refuses to consent, the health official may obtain a court order "based on clear and convincing evidence of a serious and present health threat to others" to compel testing.¹¹¹ It is not clear what evidence of a person's behavior or status constitutes "reasonable grounds" for a health official to ask a person to consent to testing. Likewise, the statutes do not define what behavior or status constitutes "clear and convincing evidence" for obtaining a court order to compel HIV testing. Arguably, a gay male's mere sexual orientation would constitute "reasonable grounds." Such discretion is problematic and could interfere with civil liberties. What evidence or behavior constitutes clear and convincing evidence needs to be clarified by the legislature.

Information about a person's HIV/AIDS status is confidential.¹¹² A "person may not disclose or be compelled to disclose" such information¹¹³ concerning another individual; however, he may voluntarily disclose such information about himself.¹¹⁴ The information also "may not be released or made public upon subpoena."¹¹⁵ Any "person responsible for recording, reporting, or maintaining information required to be reported" who "recklessly, knowingly, or intentionally discloses or fails to protect medical or epidemiologic information classified as confidential . . . commits a Class A misdemeanor."¹¹⁶ If the person violating the confidentiality requirement is a public employee, the employee is also "subject to discharge or other disciplinary action under the personnel rules of the agency that employs the employee."¹¹⁷ A private tort action, such as an action for invasion of privacy¹¹⁸ or intentional infliction of emotional distress might be available against an individual who discloses the information.

There are exceptions to the confidentiality requirement. First, an individual may consent in writing to release the information¹¹⁹ or otherwise voluntarily disclose the information.¹²⁰ Furthermore, information about an individual's

110. IND. CODE § 16-41-6-2(b) (1993).

111. IND. CODE § 16-41-62(c) (1993).

112. IND. CODE § 16-14-6-2(c) (1993).

113. IND. CODE § 16-41-8-1(a) (1993).

114. IND. CODE § 16-41-8-1(e) (1993).

115. IND. CODE § 16-41-8-1(a) (1993).

116. IND. CODE § 16-41-8-1(b) (1993).

117. IND. CODE § 16-41-8-1(c) (1993).

118. See *Lee v. Calhoun*, 948 F.2d 1162 (10th Cir. 1991); *Urbaniak v. Newton*, 277 Cal. Rptr. 354 (Cal. Ct. App. 1991); *Doe v. Shady Grove Adventist Hosp.*, 598 A.2d 507 (Md. Ct. Spec. App. 1991); *Anderson v. Strong Memorial Hosp.*, 531 N.Y.S.2d 735 (N.Y. App. Div. 1988); *Doe v. Dyer-Goode*, 566 A.2d 889 (Pa. Super. 1989).

119. IND. CODE § 16-41-8-1(d) (1993).

120. IND. CODE § 16-41-8-1(e) (1993).

HIV status may be used for a statistical purpose as long as the individual's identity is not released.¹²¹ However, the identity of individuals in a survey may be released if each person involved consents in writing to the release of his identity as well as information about his HIV status.¹²² Furthermore, confidentiality is not violated if the release of the information is necessary to protect the life or health of a named party or to enforce the public health laws.¹²³

A person who tests positive for HIV or who has AIDS does have a duty to warn sexual partners or needle-sharing partners of the person's health status as well as the need to seek health care.¹²⁴ Licensed physicians who diagnose, treat, or counsel a patient who is HIV-positive or who has AIDS "shall inform the patient" of the duty to warn.¹²⁵ Furthermore, licensed physicians, licensed hospitals, and medical laboratories must report to the Indiana State Department of Health each case of HIV infection and each confirmed case of AIDS.¹²⁶ A patient's physician-patient privilege is waived¹²⁷ when a physician notifies a health officer or a person at risk about the patient's health status¹²⁸ or non-compliant behavior.¹²⁹

Physicians¹³⁰ and non-physicians¹³¹ have a right to report a patient's HIV-positive status or AIDS diagnosis to a health officer if the physician or non-physician has reasonable cause to believe any of three conditions has occurred. The first is where the patient poses a serious and present danger to the health of others.¹³² A carrier of HIV disease is considered a "serious and present danger to others" under any of the following circumstances:

- (1) The carrier engages repeatedly in a behavior that has been demonstrated epidemiologically (as defined by rules adopted by the state department under IC 4-22-2) to transmit a dangerous communicable disease or that indicates a careless disregard for the transmission of the disease to others.
- (2) The carrier's past behavior or statements indicate an imminent danger that the carrier will engage in behavior that transmits a dangerous communicable disease to others.
- (3) The carrier

121. IND. CODE § 16-41-8-1(a)(1) (1993).

122. IND. CODE § 16-41-8-1(a)(2) (1993).

123. IND. CODE § 16-41-8-1(a)(3) (1993).

124. IND. CODE § 16-41-7-1 (1993).

125. IND. CODE § 16-41-7-3 (1993).

126. IND. CODE § 16-41-2-3 (1993).

127. IND. CODE § 16-41-2-4.

128. IND. CODE § 16-41-7-3(e)(1) (1993).

129. IND. CODE § 16-41-7-3(e)(2) (1993).

130. IND. CODE § 16-41-7-3(b)(1) (1993).

131. IND. CODE § 16-41-7-2(b) (1993). The conditions under which physicians and non-physicians may report an individual's HIV status are the same. IND. CODE § 16-41-7-2 states the conditions for non-physicians. IND. CODE § 16-41-7-3 states the conditions for physicians.

132. IND. CODE § 16-41-7-3(b)(1)(A) (1993).

has failed or refused to carry out the carrier's duty to warn under section 1 of this chapter.¹³³

The second condition is where the patient has engaged in non-compliant behavior,¹³⁴ which means "behavior of a carrier that is not in compliance with a health directive."¹³⁵ The third condition is where the patient "is suspected of being a person at risk"¹³⁶ The statute defines "persons at risk" as "(1) past and present sexual or needle sharing partners who may have engaged in high risk activity; or (2) sexual or needle sharing partners before engaging in high risk activity" with the patient.¹³⁷ A non-physician who reports in good faith to a health officer an individual's HIV status is immune from liability in civil, administrative, disciplinary, and criminal actions.¹³⁸ However, a non-physician who "knowingly or recklessly makes a false report" is "civilly liable for actual damages suffered by a person reported on and for punitive damages."¹³⁹

A physician may also personally inform a patient's sexual or needle-sharing partner, or a person legally responsible for the patient, when the physician

(A) has medical verification that the patient is a carrier; (B) knows the identity of the person at risk; (C) has a reasonable belief of a significant risk of harm to the identified person at risk; (D) has reason to believe the identified person at risk has not been informed and will not be informed of the risk by the patient or another person; and (E) has made reasonable efforts to inform the carrier of the physician's intent to make or cause the state department of health to make a disclosure to the person at risk.¹⁴⁰

In informing the patient's sexual or needle-sharing partner, the physician must inform the partner that the disease involved is HIV/AIDS, and about available health care, testing, and counseling.¹⁴¹ A physician informing a third party at risk will not be liable in any civil, criminal, administrative, or disciplinary proceeding for the disclosure.¹⁴²

If an individual diagnosed with AIDS presents clear and convincing evidence of a serious and present danger to the health of others, a state or local health official may obtain a court order to restrict the individual. The restriction could include isolation, provided that the "least restrictive but medically necessary

133. IND. CODE § 16-41-7-2 (1993).

134. IND. CODE § 16-41-7-3(b)(1)(B) (1993).

135. IND. CODE § 16-18-2-250 (1993).

136. IND. CODE § 16-41-7-3(b)(1)(C) (1993).

137. IND. CODE § 16-41-7-1(c) (1993).

138. IND. CODE § 16-41-7-2(c) (1993).

139. IND. CODE §§ 16-41-7-2(d), 16-41-2-7 (1993).

140. IND. CODE § 16-41-7-3(b)(2) (1993).

141. IND. CODE § 16-41-7-3(c)(2) (1993).

142. IND. CODE § 16-41-7-3(d) (1993).

procedures to protect the public's health" are implemented.¹⁴³ In addition, if a health official "reasonably believes that a carrier presents a serious and present health threat . . . by failure or refusal to comply with a health directive," the official may take the same action.¹⁴⁴ If a health official believes that the person with AIDS is "mentally ill and either dangerous or gravely disabled," the official may request "immediate detention under IC 12-26-4" or "emergency detention under IC 12-26-5" in order to have the "carrier apprehended, detained, and examined."¹⁴⁵

E. Health and Life Insurance

In determining whether to insure a particular individual, an insurer¹⁴⁶ may not in an application for health or life insurance ask any question "directed towards determining the applicant's sexual orientation."¹⁴⁷ Insurers simply are prohibited from using sexual orientation in the "underwriting process or in the determination of insurability."¹⁴⁸ "Neither the marital status, the 'living arrangements,' the occupation, the gender, the medical history, the beneficiary designation, nor the zip code or other territorial classification of an applicant may be used to establish, or aid in establishing, the applicant's sexual orientation."¹⁴⁹ An insurer may impose territorial rates for health and life insurance "only if the rates are based on sound actuarial principles or are related to actual or reasonably anticipated experience."¹⁵⁰ An insurer may not deny life or health insurance to an applicant simply because the applicant's medical records show the applicant sought AIDS testing or counseling.¹⁵¹ If an insurer decides to accept a risk, the insurer may not set a maximum dollar amount of coverage which is limited solely to AIDS or an AIDS-related condition, nor may the insurer provide for an exclusion of coverage which is limited solely to AIDS or an AIDS-related condition.¹⁵² However, this administrative provision does not prohibit an insurer from using that information in determining rates.¹⁵³ If the applicant has sought treatment for or has a diagnosis of AIDS in the medical records, the insurer may deny coverage.¹⁵⁴

143. IND. CODE § 16-41-9-1 (1993). *See also* IND. CODE § 16-41-9-11 (1993).

144. IND. CODE § 16-41-9-4 (1993).

145. IND. CODE § 16-41-9-5 (1993).

146. Insurer includes an out-of-state insurer. *See* IND. ADMIN. CODE tit. 760, r. 1-39-8 (1992).

147. IND. ADMIN. CODE tit. 760, r. 1-39-4(1) (1992).

148. IND. ADMIN. CODE tit. 760, r. 1-39-6 (1992).

149. IND. ADMIN. CODE tit. 760, r. 1-39-6(3) (1992).

150. IND. ADMIN. CODE tit. 760, r. 1-39-6(4) (1992).

151. IND. ADMIN. CODE tit. 760, r. 1-39-6(5) (1992).

152. IND. ADMIN. CODE tit. 760, r. 1-39-7 (1992). This section does not apply to those policies which provide coverage only for specified diseases.

153. IND. ADMIN. CODE tit. 760, r. 1-39-6(5) (1992).

154. *Id.*

Insurers may ask an applicant questions to determine whether the applicant has been diagnosed with or actually has AIDS or AIDS Related Complex (ARC), as long as the questions are "factual and designed to establish the existence of the condition."¹⁵⁵ An insurer may not ask applicants whether they *believe* they have AIDS or ARC but instead may ask applicants whether they *know* they have the condition.¹⁵⁶

An insurer may require an applicant to submit to an AIDS test at the insurer's expense only after obtaining the applicant's written consent.¹⁵⁷ If the applicant's test reveals the applicant to be HIV-positive, the insurer must follow a test protocol before rejecting the applicant's request to be insured. This protocol includes two positive ELISA tests and a non-negative Western Blot test obtained from the same sample of blood and conducted by a qualified laboratory.¹⁵⁸ These tests results are confidential but may be shared with the applicant's physician and the insurer's underwriting department.¹⁵⁹ Affiliates of the insurer and underwriting departments of reinsurers may be informed of the test results and whether the application was accepted or rejected.¹⁶⁰ The insurer may report to the Medical Information Bureau, Inc., that "unspecified blood test results were abnormal" but may not report that "blood tests of an applicant showed the presence of the AIDS virus antibodies"¹⁶¹ In reporting information to the Medical Information Bureau, Inc., the insurer's "reports must use a general code that also covers results of tests for many diseases or conditions, such as abnormal blood counts that are not related to AIDS, ARC, or similar diseases."¹⁶²

F. Criminal Law

1. *Criminal Behavior.*—Homosexual activity is legal in Indiana, assuming all parties involved are at the age of consent. Strangely, the statutory definition of rape excludes the possibility of homosexual rape. The Indiana Code limits the crime of rape, a Class B felony,¹⁶³ to sexual intercourse with "a member of the opposite sex."¹⁶⁴ The Indiana Code defines "deviate sexual conduct" as "an act involving (1) a sex organ of one person and the mouth or anus of another

155. IND. ADMIN. CODE tit. 760, r. 1-39-4(3) (1992).

156. *Id.*

157. IND. ADMIN. CODE tit. 760, r. 1-39-5 (1992).

158. IND. ADMIN. CODE tit. 760, r. 1-39-5(2) (1992).

159. IND. ADMIN. CODE tit. 760, r. 1-39-5(3) (1992).

160. IND. ADMIN. CODE tit. 760, r. 1-39-5(3)(A) (1992).

161. IND. ADMIN. CODE tit. 760, r. 1-39-5(3)(B)(i) (1992).

162. IND. ADMIN. CODE tit. 760, r. 1-39-5(3)(B)(ii) (1992).

163. IND. CODE § 35-50-2-5 provides that "[a] person who commits a Class B felony shall be imprisoned for a fixed term of ten (10) years, with not more than ten (10) years added for aggravating circumstances or not more than four (4) years subtracted for mitigating circumstances; in addition, he may be fined not more than ten thousand dollars (\$10,000)."

164. IND. CODE § 35-42-4-1 (1993).

person; or (2) the penetration of the sex organ or anus of a person by an object."¹⁶⁵ The Indiana Code criminalizes deviate sexual conduct as a Class B felony¹⁶⁶ only when it is nonconsensual. Indiana's criminal deviate sexual conduct statute is the descendent of Indiana's sodomy statute,¹⁶⁷ which was repealed in 1976. Sexual activity which is rape when the perpetrator and victim are of different genders is classified as criminal deviate conduct when the perpetrator and victim are of the same gender. Both rape and criminal deviate conduct become Class A felonies¹⁶⁸ if the conduct "is committed by using or threatening the use of deadly force, if it is committed while armed with a deadly weapon, or if it results in serious bodily injury to any person other than a defendant."¹⁶⁹ It is unclear why the definition of rape excludes the possibility of homosexual rape, especially in light of the same sentence for rape and criminal deviate conduct. The rape statute should be amended to allow for same-sex rape.

Other criminal law issues which could arise include the "homosexual panic defense," which is defined in other jurisdictions' case law as

a violent emotional reaction to a homosexual situation stemming from a person's conscious or subconscious, awareness of his own homosexual tendencies and a desire to conceal them at any cost. The result...is conduct resulting in 'fright, flight or fight', and a loss of ability to distinguish between right and wrong and the suspension of premeditation or willful intent.¹⁷⁰

The defense argues that a criminal defendant is insane or has reduced capacity to commit a crime, such as a murder or an assault. For example, a criminal defendant who is afraid of being homosexual murders or attacks a victim because the defendant perceives the victim's homosexuality.

It is unclear whether the homosexual panic defense constitutes a mental disease or defect under Indiana statutory provisions which would negate an element of a crime.¹⁷¹ A criminal defendant who has committed murder might

165. IND. CODE § 35-41-1-9 (1993).

166. IND. CODE § 35-42-4-2 (1993).

167. See *Estes v. State*, 195 N.E.2d 471 (Ind. 1964).

168. IND. CODE § 35-50-2-4 provides that "[a] person who commits a Class A felony shall be imprisoned for a fixed term of thirty (30) years, with not more than twenty (20) years added for aggravating circumstances or not more than ten (10) years subtracted for mitigating circumstances; in addition, he may be fined not more than ten thousand dollars (\$10,000)."

169. IND. CODE §§ 35-42-4-1, 35-42-4-2 (1993).

170. *State v. Thornton*, 532 S.W.2d 37, 44 (Mo. Ct. App. 1975). See *Commonwealth v. Shelley*, 373 N.E.2d 951 (Mass. 1978); *Parisie v. Greer*, 671 F.2d 1011, 1015 (7th Cir. 1982), *rev'd per curiam*, 705 F.2d 882 (7th Cir. 1983) (en banc), *cert. denied*, 464 U.S. 950 (1983). See generally *Developments in the Law—Sexual Orientation and the Law*, 102 HARV. L. REV. 1508, 1519-53 (1989).

171. See IND. CODE § 35-41-3-6 (1986) (regarding a mental disease or defect).

try to get the charge reduced to voluntary manslaughter on the ground that the homosexual panic constituted "sudden heat."¹⁷² Arguably the defense should fail on the ground that a person's fear of homosexuality does not diminish one's capacity to distinguish between right and wrong. Furthermore, the American Psychiatric Association no longer considers homosexuality a mental illness.¹⁷³ The defense should not be permitted since it actually encourages violence against gay men and lesbians.¹⁷⁴

Evidence of homosexuality has been found relevant in various criminal law cases. In one case, an Indiana court held that evidence that the defendant and his murder victim had been engaged in a homosexual relationship was admissible to provide a motive for the crime, even though the tendency of the evidence to prove the motive might be slight.¹⁷⁵

Evidence of homosexuality can be problematic since it can inflame both the jury and the judge due to society's prejudice against homosexuals. The commission of the crime should be the basis for conviction and sentencing, not the defendant's homosexuality. An attorney might ask to have the evidence excluded if it is arguably irrelevant. In addition, peremptory challenges¹⁷⁶ can be used to exclude jurors who are obviously homophobic, though determining a juror's homophobia is at best an imprecise art. The Indiana Code states that a good cause for a peremptory challenge is if the juror is "biased or prejudiced for or against the defendant."¹⁷⁷ Jurors who are homophobic could be biased against a defendant solely because of a defendant's homosexual orientation.

2. *HIV/AIDS*.—Title 35, section 38-1-7.1 of the Indiana Code provides that in determining what sentence to impose for a crime, the court may consider as aggravating circumstances or for purposes of imposing consecutive sentences of imprisonment, whether the person committed a sex crime or a crime involving controlled substances which presented the risk of HIV transmission through percutaneous contact and

(A) the crime created an epidemiologically demonstrated risk of transmission of the human immunodeficiency virus (HIV) and involved the sex organ of one (1) person and the mouth, anus, or sex organ of another person; (B) the person had knowledge that the person was a carrier of HIV; and (C) the person has received risk counseling. . . .¹⁷⁸

172. IND. CODE §§ 35-42-1-1, 35-42-1-3 (1993).

173. See *Developments in the Law—Sexual Orientation and the Law*, *supra* note 170, at 1543-46.

174. *Id.*

175. *Grime v. State of Indiana*, 450 N.E.2d 512, 518, 520-21 (Ind. 1983).

176. IND. CODE § 35-37-1-3 (1986) (providing that in a prosecution for murder, and Class A, B, or C felonies, the defendant has 10 peremptory challenges; for all other crimes, he has only 5).

177. IND. CODE § 35-37-1-5(11) (1993).

178. IND. CODE § 35-38-1-7.1 (1993).

3. *Hate Crimes*.—No survey of criminal law would be complete without a discussion of the varying proposals to criminalize so-called “hate crimes.” The proposals have caused substantial controversy within minority communities, including the gay community.

In the 1993 session of the Indiana Legislature, House Bill 1716, introduced by Representatives William Crawford and Greg Porter, would have made it a Class D felony to intimidate or harass another person, or damage or destroy the property of another person, because of the other person’s race, color, religion, sexual orientation, or national origin. If the result was bodily injury, the offense would become a Class C felony.¹⁷⁹ The proposal required law enforcement agencies to collect information documenting the extent of crimes motivated by bias. Many gay activists supported H.B. 1716 and lobbied hard to keep sexual orientation as one of the enumerated protected categories.

Legislative proposals such as H.B. 1716 suffer significant constitutional infirmities and are unlikely to survive a constitutional challenge. It is a fundamental premise of the First Amendment that conduct that cannot constitutionally be made criminal when standing alone does not become punishable simply because a person has been convicted of a separate crime.¹⁸⁰ First Amendment protection of opinion, expression, and association is not limited to protecting those activities from criminalization, but also prevents them from being the basis of punishment. If the First Amendment means anything, it means that society may not exact a price for holding beliefs that are at odds with those of the larger society. There is no constitutionally cognizable distinction between making hate a crime and making hate the sole factor in subjecting a criminal defendant to an additional number of years as part of a sentence. In both instances, it is the individual’s bigotry that is being punished.

The United States Supreme Court has considered hate crime legislation twice in recent terms. In *R.A.V. v. City of St. Paul, Minn.*,¹⁸¹ the Court struck down St. Paul City Ordinance §292.02, which provided:

Whoever places on public or private property a symbol, object, appellation, characterization or graffiti including, but not limited to, a burning cross or Nazi swastika, which one knows or has reasonable grounds to know arouses anger, alarm or resentment in others on the basis of race, color, creed, religion or gender commits disorderly conduct and shall be guilty of a misdemeanor.¹⁸²

179. Intriguingly, the legislation also required that a person who wished to burn a cross on public or private property obtain a permit from the Office of the State Fire Marshal.

180. *Wisconsin v. Mitchell*, 113 S. Ct. 2193 (1993); *State v. Wyant*, 597 N.E.2d 450 (Ohio 1992).

181. 112 S. Ct. 2538 (1992).

182. *Id.* at 2541.

Opponents of the St. Paul ordinance argued that, had it been in effect in the South during the 1950s, it could have been used to prosecute a black family for putting a sign on their front lawn demanding integration. Justice Scalia, writing for the majority, stated "[t]he point of the First Amendment is that majority preferences must be expressed in some fashion other than silencing speech on the basis of its content."¹⁸³ The Court further stated "[l]et there be no mistake about our belief that burning a cross in someone's front yard is reprehensible But St. Paul has sufficient means at its disposal to prevent such behavior without adding the First Amendment to the fire."¹⁸⁴ In the 1993 term, however, the Court upheld Wisconsin's hate crimes statute, distinguishing it from the St. Paul ordinance.¹⁸⁵ The Wisconsin statute required enhancement of the penalty for a crime committed by a defendant who

[i]ntentionally selects the person against whom the crime . . . is committed or selects the property which is damaged or otherwise affected by the crime . . . because of the race, religion, color, disability, sexual orientation, national origin or ancestry of that person or the owner or occupant of that property.¹⁸⁶

The Court accepted the argument of proponents of the Wisconsin statute that, unlike the ordinance in *R.A.V.*, the Wisconsin statute was aimed at criminal behavior rather than expression. The Wisconsin statute could only be invoked if it were shown that the defendant violated an underlying and racially neutral provision of the criminal law. As even the American Civil Liberties Union argued in its Amicus Brief, "bigotry is an idea, discrimination is an act. The First Amendment protects the former, it does not protect the latter."¹⁸⁷

Following *Mitchell*, it should be possible to enact a hate crimes statute that would withstand constitutional challenge. Representative Crawford has indicated his intent to submit legislation modeled on the Wisconsin law, and it is certainly possible that such legislation will be enacted by the Indiana legislature. Whether such a law can be passed which includes sexual orientation as a protected category is less certain. Furthermore, while many gay activists will support the proposed legislation, many others recognize substantial reason to be concerned lest such a law become a vehicle for the suppression of unpopular ideas and, by extension, unpopular "lifestyles."

183. *Id.* at 2548.

184. *Id.* at 2550.

185. *Wisconsin v. Mitchell*, 113 S. Ct. 2194 (1993).

186. *Id.* at 2197 (citing WIS. STAT. § 939.645). The statute was amended in 1992, but the amendments were not at issue in this case.

187. Amicus Brief at 15, *Mitchell* (No. 92-515). It should be noted that many ACLU affiliates, including Ohio and Indiana, disagreed with the national organization and opposed the Wisconsin statute on the same grounds that they had opposed the St. Paul ordinance. The Ohio affiliate submitted its own Amicus brief in the case.

III. CONCLUSION

This article has presented an overview of the legal status of gay men and lesbians in Indiana. HIV/AIDS issues have been presented insofar as they involve sexual orientation. Federal and state case law, statutory and administrative law are all relevant to analyzing the changing legal status of gay men and lesbians. Certainly many other issues involving gay men and lesbians have not been presented in this article, such as the current issue of homosexuals in the military. However, the article can serve as a basis for further research, as the legal position of gay men and lesbians is in a state of change. Further study and careful legislative reform are needed.

STATE AND FEDERAL CONSTITUTIONAL LAW DEVELOPMENTS

ROSALIE BERGER LEVINSON*

INTRODUCTION

Because of the movement in recent years to explore state constitutions as a largely untapped source for the protection of individual liberty, the first part of this survey explores Indiana's rather slow, but steady, movement in this direction. The remaining materials focus on state and federal court cases that raise significant federal constitutional issues implicating Indiana law and Indiana litigants.

I. DEVELOPMENTS UNDER THE STATE CONSTITUTION

Although a few years ago the Chief Justice of the Indiana Supreme Court, Randall T. Shepard, urged Indiana attorneys to reexamine Indiana's Bill of Rights as a potentially significant source for the protection of personal liberty, commentators have lamented that, with a few exceptions, there has been much more "rhetorical commitment" than substance.¹ By and large, Indiana courts continue to hold that Indiana's constitutional provisions should be interpreted the same as their federal constitutional counterparts. Thus, in *Babcock v. Lafayette Home Hospital*,² the Court of Appeals of Indiana applied the same constitutional standard in responding to state and federal challenges to Indiana's two-year statute of limitations for bringing medical malpractice claims. The court reasoned that the statute does not violate the equal protection guarantees of either the United States or the Indiana Constitutions because the limitations period was a "rational" legislative response to fiscal uncertainties in the health care industry.³ In *Hudgins v. McAtee*,⁴ the court stated that the "due course of law requirement" in Article I, Section 12 is "analogous to the due process clause of the fourteenth amendment to the United States Constitution."⁵

Similarly, with regard to most criminal procedural safeguards, Indiana courts have followed United States Supreme Court precedent interpreting parallel federal constitutional guarantees. For example, in *Lahr v. State*,⁶ the court noted that "Indiana has applied the federal analysis to speedy trial claims made under

* Professor of Law, Valparaiso University School of Law. B.A., 1969, Indiana University; M.A., 1970, Indiana University; J.D., 1973, Valparaiso University.

1. See Patrick Baude, *Recent Constitutional Decisions in Indiana*, 26 IND. L. REV. 853 (1993).

2. 587 N.E.2d 1320 (Ind. Ct. App. 1992).

3. *Id.* at 1375 (citing *Douglas v. Hugh A. Stallings, M.D., Inc.*, 870 F.2d 1242, 1248 (7th Cir. 1989)).

4. 596 N.E.2d 286 (Ind. Ct. App. 1992).

5. *Id.* at 289.

6. 615 N.E.2d 150, 151 n.2 (Ind. Ct. App. 1993).

our state constitution," and in *Scrougham v. State*,⁷ the court reasoned that double jeopardy claims brought under Article I, Section 14, should be analyzed in the same fashion as similar claims brought under the United States Constitution.⁸

In addition to its reluctance to stray from federal constitutional principles, the Indiana Supreme Court's unwillingness to issue innovative, substantive decisions under the state constitution is due to the court's narrow approach to state constitutional interpretation. The justices appear to have embraced Supreme Court Justice Antonin Scalia's jurisprudence, which emphasizes an originalist interpretation of the Constitution, rather than the theory of an evolving, developing Constitution.⁹ Thus, in *Bayh v. Sonnenburg*,¹⁰ the Indiana Supreme Court stated that its task in interpreting the Indiana Constitution was to "search for the common understanding of both those who framed it and those who ratified it"; courts should look "to the history of the times, and examine the state of things existing when the constitution or any part thereof was framed and adopted."¹¹

Decisions from last term clearly reflect this historical approach. In *Price v. State*,¹² the plaintiff challenged the constitutionality of her conviction under Indiana's disorderly conduct statute, which prohibits particular categories of speech as "unreasonable noise." Although Article I, Section 9 bars restrictions on the right to speak "on any subject whatever," it also states that "for abuse of that right, every person shall be responsible."¹³ The Indiana Court of Appeals affirmed Price's conviction, noting that pre-existing common law proscribed such kinds of speech, and that it "does not appear that the framers and ratifiers of the Constitution intended to put speech akin to 'fighting words' beyond the power

7. 564 N.E.2d 542, 545-46 (Ind. Ct. App. 1991).

8. See also *Dolliver v. State*, 598 N.E.2d 525 (Ind. 1992) (search and seizure conducted pursuant to a warrant based on a telephone call from an anonymous source violates both Fourth Amendment and Article I, Section 11). However, *Moran v. State*, 625 N.E.2d 1231 (Ind. Ct. App. 1993), held that warrantless search of curbside trash violated state constitutional rights against unreasonable search even though it did not violate the Fourth Amendment. *Id.* at 1240, and *Brady v. State*, 575 N.E.2d 981 (Ind. 1991), held that the specific requirement in Article I, Section 13 of face-to-face confrontation prohibits children from testifying via videotape in a molestation case even though the more general language in the confrontation clause of the Fourteenth Amendment might not. *Id.* at 989. Further, in *Best v. State*, 566 N.E.2d 1027 (Ind. 1991), the court held that the state constitutional principle of proportionality (Art. I, § 16) required reduction of defendant's sentence from twenty to ten years even though any alleged proportionality requirement implied by the Eighth Amendment prohibition against cruel and unusual treatment might not. *Id.* at 1032.

9. See Justice Antonin Scalia, *Originalism: The Lesser Evil*, 57 CIN. L. REV. 849 (1989), in which the Justice attacks modern constitutional scholars who have strayed from "the original meaning." *Id.* at 853-54.

10. 573 N.E.2d 398 (Ind. 1991), cert. denied, 112 S. Ct. 1170 (1992).

11. *Id.* at 412.

12. 622 N.E.2d 954 (Ind. 1993).

13. IND. CONST. art. IX, § 9.

of the Legislature to proscribe.”¹⁴ The Indiana Supreme Court disagreed with this analysis and overturned Price’s conviction.¹⁵ Thoroughly reviewing the history of the state constitution, the court explained that in Indiana “the police power is limited by the existence of certain preserves of human endeavor,” and that “[a] right is impermissibly alienated when the State materially burdens one of the core values which it embodies.”¹⁶ Reasoning that political speech is such a “core value” embodied in Section 9, and that the state punished Price for political speech protesting the legality and appropriateness of police conduct, the court held that her conviction for unreasonably noisy political “expression” could not stand unless the expression inflicted harm upon others “analogous to that which would sustain tort liability against the speaker.”¹⁷ Although Price was shouting profanities at police officers at the time of her arrest, because her speech was political speech that did not rise above the level of “a fleeting annoyance” to the residents who were the victims of her tirade, the state could not punish Price for her words.¹⁸ In short, the profanities she yelled at the police included protected political speech, to which Indiana’s constitution affords a high level of protection under Section 9.

On the other hand, in *State v. Rendleman*,¹⁹ the court used an historical argument to reject a claim that the law enforcement immunity section of the Indiana Tort Claims Act violates the “open courts” provision of the Indiana Constitution. Article I, Section 12 provides that “every person for injury done to him in his person, property, or reputation, shall have remedy by due course of law.”²⁰ However, in 1851 Indiana adhered to sovereign immunity, a remnant of English common law.²¹ Although subsequent judicial decisions eroded this

14. 600 N.E.2d 103, 114 (Ind. Ct. App. 1992). Note that one year earlier in *Fordyce v. State*, 569 N.E.2d 357 (Ind. Ct. App. 1991), the court similarly relied upon obscenity proscriptions existing at the time of the constitutional convention to conclude that the framers would have assumed obscenity to be beyond the protection of the state constitutional provision. Although the Oregon Supreme Court has interpreted the Oregon Constitution, which was copied from Indiana’s, to protect both fighting words and obscenity, the *Fordyce* court rejected its approach. *Id.* at 361-62.

15. *Price*, 622 N.E.2d at 964-65. The court, however, rejected an “overbreadth” challenge, finding that federal overbreadth analysis was never part of the history and structure of the Indiana Constitution. See also *Helton v. State*, 624 N.E.2d 499, 507 (Ind. Ct. App. 1993), relying on *Price* to reject an overbreadth challenge to Indiana’s Gang Statute.

16. *Id.* at 960.

17. *Id.* at 964. The public nuisance doctrine would not be a constitutional application of the legislature’s duty to protect. *Id.*

18. *Id.* See also *Radford v. State*, 627 N.E.2d 1331 (Ind. Ct. App. 1994) (because Radford’s speech protested the legality and appropriateness of police conduct and that speech at most comprised a public nuisance, conviction for disorderly conduct must be reversed). Cf. *Stites v. State*, 627 N.E.2d 1343 (Ind. Ct. App. 1994) (because defendant was not protesting appropriateness of police conduct, but was merely uttering obscenities, disorderly conduct conviction must stand; mere presence of police officer does not convert defendant’s speech into political expression).

19. 603 N.E.2d 1333 (Ind. 1992).

20. See IND. CONST. art I, § 9.

21. *Id.* at 1335.

common law sovereign immunity, the Indiana Supreme Court nonetheless found no historical justification for invalidating the immunity provision: "Article I, Section 12 does not prevent the legislature from modifying or restricting common law rights and remedies, [because] no one has a vested [constitutional] interest in any rule of the common law" ²² The court continued, noting that "Indiana's Constitution does not forbid abolition of old rights recognized by the common law in order to attain permissible legislative objectives." ²³ In short, although some have urged Indiana courts to take a more vigorous, innovative approach in interpreting the Indiana Constitution, ²⁴ absent a well-founded historical justification, it does not appear that Indiana courts currently are inclined to do so.

In addition to *Price*, there were a few other noteworthy decisions suggesting the unique importance of the Indiana Constitution. Two cases focused on Article I, Section 12 (the same provision at issue in *Rendleman*). In *Bals v. Verduzco*, ²⁵ the Indiana Supreme Court found in Section 12 a state constitutional right of access to the courts for employees injured as a result of intra-company defamatory falsehoods. Because, unlike the federal constitution, the Indiana Constitution specifically guarantees a remedy for injury to reputation, the court refused to adopt the position prevailing in many jurisdictions that defamatory material must be communicated to third parties in order to be actionable. ²⁶ The legal fiction that intra-company communication of defamatory information is not "publication" was found to interfere with "values embodied in our state constitution." ²⁷

In a second case, *Campbell v. Criterion Group*, ²⁸ the Indiana Court of Appeals relied upon Article I, Section 12's requirement that courts be open and available "without purchase" when it determined that courts must provide indigent civil appellants with a record of proceedings prepared without cost. On transfer, the Indiana Supreme Court, while agreeing that civil appellants are entitled to appeal *in forma pauperis*, rejected the notion that appellants are necessarily entitled to a transcript at public expense. ²⁹ Relying upon Indiana's Rules of Appellate Procedure, the court reasoned that an appellant must first demonstrate that his appeal cannot be perfected through preparation of a "statement of evidence," which is used when a transcript is physically unavailable. Because Campbell failed to demonstrate that his appeal could not be perfected by preparing such a statement of evidence, it affirmed the trial court's refusal to order the transcription at public expense. ³⁰

22. *Id.*

23. *Id.* at 1336.

24. *See, e.g.,* Baude, *supra* note 1, at 864.

25. 600 N.E.2d 1353, 1355-56 (Ind. 1992).

26. *Id.* at 1355.

27. *Id.*

28. 588 N.E.2d 511, 516 (Ind. Ct. App. 1992).

29. *Campbell v. Criterion Group*, 605 N.E.2d 150 (Ind. 1992).

30. *Id.* at 160-61.

One final area involving state constitutional law deserves mention. Although the language in Article I, Section 23 of the Indiana Constitution (“the general assembly shall not grant to any citizen, or class of citizens, privileges or immunities, which, upon the same terms, shall not equally belong to all citizens”), is significantly different from the text of the Fourteenth Amendment (no state shall “deny to any person within its jurisdiction the equal protection of the laws”), Indiana decisions have held that the federal and state equal protection guarantees are coextensive and protect identical rights.³¹ Thus, in the absence of a fundamental right or a suspect classification, Indiana courts have used a highly deferential approach and have sustained statutes and ordinances supported by any rational basis. For example, in *Pazzaglia v. Review Board of Indiana Department of Employment and Training Services*,³² the Indiana Court of Appeals sustained an unemployment compensation rule that denies benefits to an employee who leaves a job voluntarily and then is terminated from a second job in less than ten weeks. The court held that the rule is rationally related to the state’s legitimate interest in stabilizing employment and in protecting the first employer’s interests.³³ In *Thomas v. Greencastle Community School Corp.*,³⁴ the same court held that a high school athletic association rule that prevents students over age nineteen from competing in inter-school athletic competition bears a rational relationship to the legitimate interests of promoting safety and fair competition.³⁵

*Indiana High School Athletic Ass’n v. Schafer*³⁶ represents a marked departure from this deferential approach. The Indiana Court of Appeals in *Schafer* recognized the rationality of an Indiana High School Athletic Association (IHSAA) rule whereby students enrolled in school beyond the ordinary eight semesters of high school are ineligible to participate in interscholastic athletics.³⁷ Because, however, Schafer was repeating the academic year due to an illness and not due to academic deficiency, the court held that the rule swept too broadly and could not constitutionally be applied to Schafer’s circumstances.³⁸ In reaching its conclusion, the court cited as authority an earlier Indiana Supreme

31. *United Farm Bureau Mut. Ins. Co. v. Lowe*, 583 N.E.2d 164 (Ind. Ct. App. 1991).

32. 608 N.E.2d 1375 (Ind. Ct. App. 1993).

33. *Id.* at 1378.

34. 603 N.E.2d 190 (Ind. Ct. App. 1992).

35. 603 N.E.2d at 194. *See also* *Kleiman v. State*, 590 N.E.2d 660 (Ind. Ct. App. 1992) (state statute providing for expungement of arrest records of persons wrongfully arrested due to mistaken identity or lack of probable cause, but denying expungement to those acquitted after trial, is a reasonable classification which does not violate Section 23); *Babcock v. Lafayette Home Hosp.*, 587 N.E.2d 1320, 1325-26 (Ind. Ct. App. 1992) (although the shorter statute of limitations applied to medical malpractice claims may provide “harsh results in some instances,” the distinction is sustained as bearing “a rational relationship to legitimate state interest”).

36. 598 N.E.2d 540 (Ind. Ct. App. 1992).

37. *Id.* at 551 (it establishes the “primacy of classroom education over athletics”).

38. *Id.* at 554.

Court decision, *Sturup v. Mahan*,³⁹ in which another provision of IHSAA bylaws was invalidated because “they sweep too broadly in their proscription and, hence, violate the Equal Protection Clause of the 14th Amendment.”⁴⁰ Because the concept of overbroad rule-making is not a part of a traditional federal equal protection analysis, one may explain *Sturup* and *Schaefer* only as state constitutional decisions. In *Jordan v. Indiana High School Athletic Ass’n*,⁴¹ the federal district court for the Northern District of Indiana remarked that Indiana had adopted a “modified rational basis test” that requires not only a rational relationship to a legitimate government interest, but also that the means be narrowly tailored to the asserted government purpose.⁴²

Because at this point Indiana courts have yet to explain the source of such an overbreadth rule,⁴³ it is probably premature to suggest that courts will give Section 23 of the Indiana Constitution greater teeth than its federal constitutional counterpart. Indeed, an Indiana appellate court, commenting on *Schaefer*, stated that this “modified rational basis test,” is “out of the mainstream of equal protection case law.”⁴⁴ Because the Indiana Supreme Court in *Sturup* “gave no reason for its departure from traditional equal protection analysis and did not provide any guidance as to its future implications,” the court cautioned that one should read the decisions narrowly, and that courts should limit their application to the examination of similar rules.⁴⁵

II. FEDERAL CONSTITUTIONAL LAW DEVELOPMENTS

A. Procedural Due Process

In deciding whether a law violates procedural due process rights, the United States Supreme Court applies a two-prong analysis, requiring that a plaintiff initially identify a property or a liberty interest, and, assuming the plaintiff meets

39. 305 N.E.2d 877 (Ind. 1974).

40. *Id.* at 881.

41. 813 F. Supp. 1372 (N.D. Ind. 1993).

42. *Id.* at 1378. The Seventh Circuit has ruled that the appeal of this suit was rendered moot by the player’s graduation, and thus it did not reach the merits of the equal protection challenge. 16 F.3d 785 (7th Cir. 1994).

43. If anything, the Indiana Supreme Court in *Sturup* suggests it is applying federal constitutional law (albeit incorrectly): “said bylaws are *unreasonable* in that they sweep too broadly in their proscription, and hence, violate the Equal Protection Clause of the 14th Amendment.” 305 N.E.2d at 881.

44. *Thomas v. Greencastle Community Sch. Corp.*, 603 N.E.2d 190, 193 (1992).

45. *Id.* In *Thomas*, the court sustained the age eligibility requirements of the IHSAA, rejecting the “under-inclusive” challenge brought by the plaintiffs, but suggesting that the rule could have withstood an over-inclusive challenge even under intermediate scrutiny. *See also Crane v. Indiana High Sch. Athletic Ass’n*, 975 F.2d 1315 n.6 (7th Cir. 1992) (relying on a pendent state law claim in order to avoid a constitutional challenge to another IHSAA eligibility rule).

this burden, the Court then balances the competing interests to determine whether the state has afforded sufficient procedural safeguards.

1. *Identification of Protected Interest.*—Turning to the first part of the analysis, state or local law or custom often dictates whether a property or liberty interest has been created. In *Colburn v. Trustees of Indiana University*,⁴⁶ the Seventh Circuit held that faculty members had no property interest either in tenure or reappointment.⁴⁷ Although a university handbook and appointment documents set forth criteria and procedures to be used regarding employment decisions, the court reasoned that a property interest is created only “when an employer’s discretion is clearly limited so that the employee cannot be denied employment unless specific conditions are met.”⁴⁸ The assertions in the handbook that faculty members would be judged by certain criteria were insufficient to create a property interest. Further, because there was no formal reappointment system that included annual reviews, it was unlikely that faculty members could have reasonably relied on any assurances they received from individual faculty members as guarantees of their continued future employment.⁴⁹ Similarly, in *Swartz v. Scruton*,⁵⁰ the Seventh Circuit held that a state university professor did not enjoy, by virtue of contract, rule, or understanding, a legitimate claim of entitlement to a merit pay increase.⁵¹ Although the professor might expect a merit pay increase, he had no property right to a specific amount of merit pay because such was based on multiple layers of contingency. Further, even if the contract set forth procedures for assessing merit, this contractual right was not the equivalent of a constitutionally protected property right.⁵²

On the other hand, in *McCammon v. Indiana Department of Financial Institutions*,⁵³ the court held that because the state civil service statute provided that employees could be removed only for certain enumerated acts of misconduct, the plaintiffs had a constitutionally protected property interest.⁵⁴ Although Indiana law was subsequently amended explicitly to require a showing of cause

46. 973 F.2d 581 (7th Cir. 1992).

47. *Id.* at 589-92.

48. *Id.* at 589.

49. *Id.* at 592.

50. 964 F.2d 607 (7th Cir. 1992).

51. *Id.* at 610-11.

52. *Id.* at 610. See also *Burns Harbor Fish Co. v. Ralston*, 800 F. Supp. 722 (S.D. Ind. 1992) (although fishermen had a protected property interest in their fishing licenses, they did not have a due process property interest in using gill nets within the confines of Indiana waters of Lake Michigan since the statutory ban limited merely the means by which fishermen could catch fish, not the licenses themselves).

53. 973 F.2d 1348 (7th Cir. 1992), *cert. denied*, 113 S. Ct. 1282 (1993).

54. *Id.* at 1351-52.

for dismissal,⁵⁵ the amendment was intended to clarify, rather than alter, existing law.

Indiana employees who cannot establish a vested property interest, i.e., who serve "at will," may nonetheless seek federal procedural safeguards where, at the time of their termination, the employer defames them to such an extent as to foreclose future job opportunities, thus interfering with a federally-recognized liberty interest.⁵⁶ In order to trigger the right to a so-called "name-clearing hearing," the employee must establish that the comments were made incident to the loss of employment, and that they were so maligning as to foreclose future job opportunities. Thus, in *Wroblewski v. City of Washburn*,⁵⁷ the Seventh Circuit rejected due process claims brought by the city's ex-mayor because the comments that the mayor was judgment-proof were not "morally stigmatizing," nor were they made incident to the loss of employment. Moreover, *Wroblewski* could not show that he was excluded from his profession on a permanent or protracted basis.⁵⁸ Similarly, in *Vukadinovich v. Board of School Trustees*,⁵⁹ the Seventh Circuit held that derogatory comments made by school board trustees *after* the board fired the teacher did not trigger due process because at that point, the teacher faced no threat of lost employment, and because he presented no evidence that his prospects for future employment were diminished.⁶⁰

2. *What Process Is Due?*—Once a protected property or liberty interest is identified, the necessary procedural safeguards are determined by balancing (a) the private interest affected; (b) the risk of erroneous deprivation and the value of additional procedural safeguards; and (c) the government's interests.⁶¹ The United States Supreme Court applied this three-pronged test last term in *Heller v. Doe*⁶² to assess the validity of Kentucky's involuntary mental retardation

55. See IND. CODE § 28-11-2-5 (1993).

56. Note that the Supreme Court in *Paul v. Davis*, 424 U.S. 693 (1976), held that damage to reputation alone does not constitute a liberty interest. Further, it has clarified that unless the alleged stigma occurs incident to loss of government employment or some other tangible benefit, there is no federal claim. *Siebert v. Gilley*, 500 U.S. 226 (1991). Compare the earlier discussion of Indiana's constitutional guarantee of a remedy for injury to reputation. See *supra*, notes 26-27 and accompanying text.

57. 965 F.2d 452 (7th Cir. 1992).

58. *Id.* at 456-57. The city had actually adopted a policy of refusing to contract with any private marina operator that hired the ex-mayor, who claimed this exclusionary policy deprived him of occupational liberty.

59. 978 F.2d 403 (7th Cir. 1992).

60. *Id.* at 413. See also *McMath v. City of Gary*, 976 F.2d 1026 (7th Cir. 1992) (although plaintiff demonstrated violation of his occupational liberty interest by showing he was stigmatized by publicly disclosed information and that he suffered a tangible loss of employment opportunities as a result of public disclosure, the evidence failed to establish that it was the defendants who disseminated the stigmatizing information beyond the appropriate chain of command within the city of Gary, thus requiring reversal of the jury verdict on this issue).

61. *Mathews v. Eldridge*, 424 U.S. 319, 334-35 (1976).

62. 113 S. Ct. 2637 (1993).

commitment procedures that allowed guardians and immediate family members to participate in the proceedings. Plaintiffs argued that participation by such persons whose interests may be adverse to that of the individual facing possible involuntary commitment "skews the balance" against retarded individuals.⁶³ Applying the *Mathews* test, the Court concluded that participation by close relatives and legal guardians did not increase the risk of erroneous deprivation. Even if the participation might increase the chances that the proceeding will result in commitment, the Court determined that this does not suggest a due process violation because due process is intended to enhance accurate, not pro-plaintiff, decision-making.⁶⁴

In the employment context, minimal procedural due process requires only adequate notice of charges and an opportunity to present one's side. In *Vukadinovich v. Board of School Trustees*,⁶⁵ because the plaintiff was given notice, specific reasons for his termination, and the right to present evidence and cross-examine witnesses, the Seventh Circuit held that he was not denied due process.⁶⁶ Similarly, in *Payne v. Housing Authority*,⁶⁷ the district court sustained the procedure used to dismiss a city employee, noting that the "root requirement" of due process demands only that an individual be given an opportunity for a hearing before being deprived of a significant property interest, and that this need not include legal representation nor the procedural rules of a court trial.⁶⁸

On the other hand, in *City of Mitchell v. Graves*,⁶⁹ the court held that notice provided eight days before a hearing did not give the attorney adequate time to prepare a defense or to test the validity of charges leveled against a police officer. Therefore, the denial of the police officer's motion for continuance of the disciplinary hearing violated due process, even though proceedings before administrative bodies are not required to be conducted with all the procedural safeguards afforded to judicial proceedings.⁷⁰

The *Mathews* balance has also been important outside the context of employment decisions. In *Holmes v. Randolph*,⁷¹ the Indiana Supreme Court applied *Mathews* to assess the validity of Indiana's law governing the towing and disposal of abandoned vehicles. The court held that the Indiana statute, which provides for attaching notice to vehicles for at least seventy-two hours and then providing notice by first-class mail, satisfied minimal due process.⁷² Due

63. *Id.* at 2648.

64. *Id.* at 2649.

65. 978 F.2d 403 (7th Cir. 1992).

66. *Id.* at 413.

67. 821 F. Supp. 561 (S.D. Ind. 1993).

68. *Id.* at 562.

69. 612 N.E.2d 149 (Ind. Ct. App. 1993).

70. *Id.* at 152.

71. 610 N.E.2d 839 (Ind. 1993).

72. *Id.* at 846.

process was not violated by the mere possibility that mail notice might not reach persons on vacation or removed from their homes, nor would added procedures, such as certified mail, significantly reduce the chance of error. As the court noted, "[P]rocedural due process rules are shaped by the risk of error inherent in the process as applied to the generality of cases, not the rare exceptions."⁷³

Indiana prisoners again brought several procedural due process challenges. In *Forbes v. Trigg*,⁷⁴ the court held that due process was violated by an Indiana Department of Correction rule allowing inmates and staff members to refuse to testify at disciplinary hearings without explanation.⁷⁵ While urging the Department to enact a new rule, the court concluded that, as applied in this case, there was no due process violation because the testimony sought from prison officials who disciplined the inmate was repetitive and unnecessary.⁷⁶ In *Rasheed-Bey v. Duckworth*,⁷⁷ the court held that due process entitles inmates to disclosure of exculpatory evidence in disciplinary proceedings, unless disclosure would unduly threaten institutional concerns.⁷⁸ However, the court found that in this case the information sought was not exculpatory and was more likely to hurt the inmate's case than to help it, and, thus, the process used to impose disciplinary segregation against Rasheed-Bey satisfied constitutional requirements.⁷⁹

B. Substantive Due Process

1. *Protection Against Arbitrary Government Action.*—In *Zinerman v. Burch*,⁸⁰ the Supreme Court articulated the well-established rule that the due process clause contains a substantive component that bars certain arbitrary, wrongful government conduct regardless of the fairness of the procedures provided. Although federal courts have been generally reluctant to invalidate government action on substantive due process grounds, this limitation was successfully invoked in *Smith v. School City of Hobart*.⁸¹ The district court held that a school's reduction of grades for alcohol-related misconduct (four percent grade reduction for each day the student was suspended for alcohol use) violated a student's substantive due process rights because there was no reasonable relationship between the misconduct and the student's academic performance.⁸² Further, although a plaintiff arguably must identify an underly-

73. *Id.* at 845 (quoting *Mathews*).

74. 976 F.2d 308 (7th Cir. 1992).

75. *Id.* at 317.

76. *Id.* at 318.

77. 969 F.2d 357 (7th Cir. 1992).

78. *Id.* at 362.

79. *Id.*

80. 494 U.S. 113 (1990).

81. 811 F. Supp. 391 (N.D. Ind. 1993).

82. *Id.* at 399.

ing liberty or property interest in order to prevail under a substantive due process theory, several courts, including the Seventh Circuit, have reasoned that the term “liberty” should be given a broader interpretation in the substantive due process context.⁸³ For example, in *Wroblewski v. City of Washburn*,⁸⁴ the Seventh Circuit reasoned that although the plaintiff could not establish occupational liberty in the procedural due process sense, this did not foreclose him from alleging a substantive due process violation of liberty that includes “a freedom from all substantial arbitrary impositions and purposeless restraints.”⁸⁵

Although substantive due process theoretically remains a viable tool for challenging government abuse of power, unless fundamental constitutional rights are implicated, a highly deferential standard is used.⁸⁶ Thus, in *Wroblewski* the Seventh Circuit proceeded to hold that even if the city acted out of animosity in effectively excluding the plaintiff from working at its marina, the action did not rise to the level of offensiveness or repugnance needed to find a substantive due process violation.⁸⁷ The city’s conduct did not “shock the conscience” or “fly in the face of our society’s standards of decency.”⁸⁸

Similarly, in *TXO Production Corp. v. Alliance Resources Corp.*,⁸⁹ the United States Supreme Court failed to find a substantive due process violation when a jury awarded ten million dollars in punitive damages in a case in which actual damages were only \$19,000. In a plurality opinion, three Justices concluded that the jury could have “reasonably” imposed this punitive damage award.⁹⁰ It was not so “grossly excessive” as to violate due process, because millions of dollars were potentially at stake, TXO acted in bad faith, its conduct was part of a broader, larger pattern of fraud and deceit, and TXO was a very wealthy defendant.⁹¹ Although Justice Kennedy rejected the plurality’s “reasonable” formulation, he concurred in the judgment on grounds that the jury’s verdict reflected a rational concern for deterrence and retribution, rather than bias, passion, or prejudice.⁹² The fifth and sixth votes in the majority came from Justices Scalia and Thomas, who totally rejected the substantive due process analysis, arguing that federal courts have no business whatsoever in this area except to ensure that procedural due process has been observed.⁹³ Because the majority opinion was so divided on the rationale for rejecting the substantive

83. See, e.g., *Paul v. Davis*, 424 U.S. 693, 710 n.5 (1976).

84. 965 F.2d 452 (7th Cir. 1992).

85. *Id.* at 457 (citing *Poe v. Ullman*, 367 U.S. 497, 542-43 (1961)).

86. See Levinson, *Protection Against Government Abuse of Power: Has the Court Taken the Substance Out of Substantive Due Process?*, 16 U. DAYTON L. REV. 313 (1991).

87. *Wroblewski*, 965 F.2d at 458.

88. *Id.*

89. 113 S. Ct. 2711 (1993).

90. *Id.* at 2722.

91. *Id.* at 2722-23.

92. *Id.* at 2725-26.

93. *Id.* at 2727.

due process claim, the decision leaves this area in a continuing state of uncertainty. As the plurality noted, there is no "mathematical bright line between the constitutionally acceptable and the constitutionally unacceptable that would fit every case."⁹⁴ On the other hand, as Justice Scalia pointed out, the decision may as a practical matter eliminate most substantive due process challenges to punitive damages awards: "... the great majority of due process challenges to punitive damages awards can henceforth be disposed of simply with the observation that 'this is no worse than *TXO*'"⁹⁵

*Collins v. City of Harker Heights*⁹⁶ reflects a further, significant limitation on substantive due process claims. *Collins* held that a city's failure to train a sanitation department employee or to warn him about known risks of harm could not be characterized as arbitrary or conscience-shocking in a constitutional sense.⁹⁷ Therefore, the United States Supreme Court denied claims brought by the widow of an employee who died of asphyxia after entering a manhole to unstop a sewerline without wearing safety gear. More fundamentally, the Court ruled that the due process clause simply does not impose any affirmative duty on government entities to provide its employees with minimal levels of safety in the workplace.⁹⁸

Similarly, the United States Supreme Court has ruled that absent a custodial relationship, such as exists with regard to prisoners or the mentally ill who have been institutionalized by the state,⁹⁹ there is no affirmative duty on the part of government to provide protective services.¹⁰⁰ Thus, in *DeShaney v. Winnebago County Department of Social Services*,¹⁰¹ the Supreme Court held that nothing in the due process clause requires the state to protect life, liberty and property against invasion by private actors or to provide substantive services for those

94. *Id.* at 2720 (citing *Pacific Mut. Ins. Co. v. Haslip*, 499 U.S. 1, 18 (1991)).

95. *Id.* at 2727. Of course, Justice Scalia asserted that he would "shut the door" that the majority left slightly ajar. In a second case, *Concrete Pipe & Prod. v. Construction Laborers Trust*, 113 S. Ct. 2264 (1993), the Supreme Court rejected a substantive due process challenge to the imposition under federal law of withdrawal liability from pension programs. The Court reasoned that the penalty was rationally related to the terms of Concrete Pipe's participation in the plan it joined, and that this sufficed for substantive due process scrutiny regarding economic legislation. 113 S. Ct. at 2289.

96. 112 S. Ct. 1061 (1992).

97. *Id.* at 1070.

98. *Id.* at 1069-70. See also *Reilly v. Waukesha County*, 993 F.2d 1284, 1287 (7th Cir. 1993) (due process clause does not create an entitlement to "low-risk" employment).

99. See *Swofford v. Mandrell*, 969 F.2d 547 (7th Cir. 1992) (due process protects pretrial detainees from deliberate exposure to violence and from failure to protect when prison officials learn of a strong likelihood that a prisoner will be assaulted; detainee's allegations that his cell was not inspected for over eight hours despite his screams, that a make-shift weapon was accessible in the cell, and that he was placed in a dangerous population satisfy the requirement that plaintiff plead a level of intent at least as high as deliberate indifference or reckless disregard).

100. See *Wells & Eaton, Affirmative Duty and Constitutional Tort*, 16 U. MICH. J.L. REF. 1, 15 (1982).

101. 489 U.S. 189 (1989).

within its borders.¹⁰² Similarly, in *Culver-Union Township Ambulance Service v. Steindler*,¹⁰³ the Indiana Supreme Court ruled that a township policy of limiting lifesaving services while affirmatively undertaking to render ambulance services could not be challenged under the due process clause. The court reasoned that the Fourteenth Amendment does not require government to provide rescue services, and thus an “inept rescue is not a cognizable theory for due process liability.”¹⁰⁴

2. *Protection of Fundamental Rights.*—The United States Supreme Court has held that certain individual rights, although not enumerated in the Constitution, are protected by the concept of liberty from government interference unless the state can prove a compelling justification for its action. Beginning with the 1965 decision in *Griswold v. Connecticut*,¹⁰⁵ which struck down a statute forbidding the distribution or use of contraceptive devices, the Court has identified the existence of fundamental rights protecting privacy and personal autonomy in matters of procreation,¹⁰⁶ marriage,¹⁰⁷ and the family.¹⁰⁸ In recent years, however, the Court has narrowed the doctrine of fundamental rights by limiting it to interests rooted in the traditions and collective conscience of the people. For example, in *Bowers v. Hardwick*,¹⁰⁹ the Court held that because sodomy statutes have a lengthy history, sexual preference cannot be regarded as a fundamental right.¹¹⁰

This analysis was used to reject claims made by detained alien juveniles to an Immigration and Naturalization Service (INS) regulation that allowed their release only to parents, close relatives, or legal guardians. In *Reno v. Flores*,¹¹¹ Justice Scalia found that a child who has no available parent, close relative, or legal guardian has no fundamental right to be placed in the custody of a “willing-and-able” private custodian instead of a government-operated or selected child-care institution.¹¹² Justice Scalia reasoned that no such right is “rooted in the tradi-

102. *Id.* at 196. See Levinson, *supra* note 86, at 338-42.

103. 629 N.E.2d 1231 (Ind. 1994).

104. *Id.* at 1234-35. See also *Mullin v. Municipal City of South Bend*, 618 N.E.2d 42 (Ind. Ct. App. 1993) (negligence action against city to recover for delay in dispatching paramedic unit to house fire was properly dismissed because the city owed no special duty of care to the plaintiffs; the fact that the dispatcher was informed of the address at which the fire was located, and the names of the residents therein, does not establish a special, individualized relationship entitling the plaintiffs to recover).

105. 381 U.S. 479 (1965).

106. *Roe v. Wade*, 410 U.S. 113 (1973) (woman's right to decide whether to terminate pregnancy).

107. *Loving v. Virginia*, 388 U.S. 1 (1967) (freedom to marry person of another race).

108. *Moore v. City of East Cleveland*, 431 U.S. 494 (1977) (right of grandmother to reside with her grandsons).

109. 478 U.S. 186 (1986), *reh'g den.*, 478 U.S. 1039 (1986).

110. *Id.* at 196.

111. 113 S. Ct. 1439 (1993).

112. *Id.* at 1447.

tions and conscience of our people as to be ranked as fundamental,” and thus there was no need to subject the INS regulation to heightened scrutiny.¹¹³ Although Justices O'Connor and Souter concurred in the judgment, they rejected Justice Scalia's characterization of the right in question. They found the right at issue to be “freedom from institutional confinement,” which triggers heightened, substantive due process scrutiny.¹¹⁴ They found, however, that the INS program survived heightened scrutiny where governmental custody is decent and humane and not punitive.¹¹⁵

C. Equal Protection

1. *Rational Basis Analysis.*—Although the core concern of the Equal Protection Clause of the Fourteenth Amendment is that persons similarly situated must be treated the same, the United States Supreme Court has made clear that where the classification does not single out a suspect class or affect a fundamental right, statutes will be given a strong presumption of constitutional validity. Thus, in *FCC v. Beach Communications, Inc.*,¹¹⁶ the Court sustained the 1984 U.S. Cable Communications Policy Act, which requires television systems to obtain franchises from local government while exempting Satellite Master Antenna Television (SMATV) that serves commonly owned or managed buildings that do not use a public right-of-way. Plaintiffs contended that there was no basis to treat systems that do not use public right-of-way differently merely because some of the systems serve commonly owned buildings while others serve separately owned buildings. The lower court held that the justifications were without foundation.¹¹⁷ The Court reversed, unanimously finding that the common ownership distinction was constitutional.¹¹⁸

The Court emphasized that in areas of social and economic policy, a statutory classification is valid if any reasonably conceivable state of facts provides a rational basis for the classification; moreover, the statute bears a strong presumption of validity and those attacking the rationality carry the burden of negating every conceivable basis that might support the law.¹¹⁹ Further, because the legislature need not articulate its reasons for enacting a statute, it was irrelevant whether the FCC actually was motivated by the conceived reason for the challenged distinction.¹²⁰ The Court emphasized that legislative choice should not be subject to courtroom factfinding, and that adherence to these restraints was necessary to preserve the rightful place and independence of the

113. *Id.*

114. *Id.* at 1454.

115. *Id.* at 1454-56.

116. 113 S. Ct. 2096 (1993).

117. *Id.* at 2100.

118. *Id.* at 2104.

119. *Id.* at 2101-02.

120. *Id.* at 2102.

legislative branch.¹²¹ Thus, despite the lower court's finding that the FCC had submitted nothing more than a "naked intuition, unsupported by conceivable facts or policies,"¹²² the Court refused to enter the thicket of more carefully probing administrative justifications for economic regulation.

Outside the area of economic regulation, the United States Supreme Court has been equally reluctant to apply heightened scrutiny. Although the deferential approach is abandoned where the classification affects a suspect class or a fundamental right, the Court in recent years has refused to recognize groups as suspect or rights as fundamental.¹²³ This past term, in *Heller v. Doe By Doe*,¹²⁴ the Court was asked to decide whether differences between the mentally retarded and the mentally ill justify different involuntary commitment procedures. Kentucky allowed mentally retarded persons to be committed on the basis of clear and convincing evidence, while proof beyond a reasonable doubt was needed to commit mentally ill persons. In addition, it allowed close relatives and guardians to participate as parties in proceedings for the mentally retarded, but not for the mentally ill.¹²⁵ The Court, in a five to four ruling, held that there was a rational basis for such differential treatment and consequently no equal protection violation.¹²⁶ The Court declined to discuss the question of whether heightened scrutiny was needed because it was not properly raised below,¹²⁷ but it cited as authority its earlier holding in *Cleburne v. Cleburne Living Center, Inc.*, in which the Court refused to categorize the mentally retarded as a super-protected suspect class.¹²⁸ The Court reasoned that "a classification neither involving fundamental rights nor proceeding along suspect lines is accorded a strong presumption of validity."¹²⁹ Further, it emphasized that the legislature need not articulate a purpose or rationale supporting its classification, but rather the law must be sustained provided any "reasonably conceivable state of facts" can provide a justification.¹³⁰ It noted that "courts are compelled under rational-basis review to accept a legislature's generalizations even when there is an imperfect fit between means and ends."¹³¹

121. *Id.*

122. *Id.* at 2100.

123. *See, e.g.*, *Gregory v. Ashcroft*, 111 S. Ct. 2395 (1991) (age is not a suspect classification); *City of Cleburne v. Cleburne Living Ctr., Inc.*, 473 U.S. 432 (1985) (mental retardation is not a trait, like race or gender, that triggers higher levels of equal protection scrutiny).

124. 113 S. Ct. 2637 (1993).

125. *Id.* at 2640-41.

126. *Id.* at 2650.

127. *Id.* at 2642.

128. *Id.* at 2643.

129. *Id.* at 2642.

130. *Id.*

131. *Id.* at 2643.

As to the different standards of proof, Justice Kennedy reasoned that because mental illness is more difficult to diagnose than mental retardation, Kentucky's decision to assign a lower level of proof in commitment proceedings involving the mentally retarded was justified. Both in determining whether the person suffers from mental illness or mental retardation and in assessing whether the person presents a danger or a threat of danger to self, family, or others, the difference in diagnosis alone provides a rational basis for the disparate treatment of the two groups.¹³² In addition, Justice Kennedy reasoned that because the prevailing methods of treatment for the mentally ill are much more invasive than those given the mentally retarded, the higher burden of proof at the commitment stage was rational.¹³³

Addressing the disparate rule regarding involvement of close relatives and guardians, six Justices agreed that their participation in proceedings for the mentally retarded was permitted because they would more likely have valuable insights that could be considered during the involuntary commitment process.¹³⁴ Mental illness, by contrast, often manifests itself with suddenness and usually after minority. Thus family members would be less likely to provide necessary information. Also, individuals previously of sound mental health may have a need for privacy that justifies the state in confining a commitment proceeding to the "smallest group compatible with due process."¹³⁵ Although arguably Kentucky could have required relatives and guardians to participate without being parties to proceedings for the mentally retarded, the majority emphasized that traditional equal protection analysis does not require a state to choose the least-restrictive means of achieving its legislative end.¹³⁶

The dissenting Justices argued that the Kentucky scheme could not survive rational-basis scrutiny, and that the majority had failed to follow *Cleburne*, which, despite its purported rejection of heightened scrutiny, required some inquiry into the record to support the state's proffered justifications.¹³⁷ The dissenters contended that the majority's emphasis on the diagnostic differences was too narrow and ignored the fact that the respective interest of the public and the subjects of the commitment proceeding were identical: "Both the ill and the retarded may be dangerous, each may require care, and the State's interest is seemingly of equal strength in each category of cases."¹³⁸ As to the purported difference in treatment, the dissent presented statistical data suggesting that seventy-six percent of the institutionalized retarded also receive some type of psychoactive drug, and that fully fifty-four percent receive psychotropic

132. *Id.* at 2644.

133. *Id.* at 2645.

134. *Id.* at 2647-48.

135. *Id.*

136. *Id.* at 2648.

137. *Id.* at 2651-52.

138. *Id.* at 2653.

drugs.¹³⁹ Thus, there was no plausible basis for the majority's assumption that the institutional response to mental retardation is less intrusive than treatment of mental illness. By applying the highly deferential approach used for traditional equal protection analysis, the majority ignored this data and refused to more closely scrutinize the state's proffered justifications for its enactment.

2. *Heightened Scrutiny*.—When a law intentionally discriminates against a suspect class—race, national or ethnic origin, or to a certain degree alienage—or if it interferes with a fundamental right, the Court applies strict scrutiny, requiring the government to show a compelling interest and no less drastic means for its legislation.¹⁴⁰ Further, in the areas of gender and illegitimacy, the Court has applied a so-called intermediate approach requiring the government to show that the classification bears a fair and substantial relationship to an important government interest.¹⁴¹

As to heightened scrutiny based upon suspect classification, the United States Supreme Court in recent years has invoked the equal protection guarantee to invalidate the use of peremptory challenges on the basis of race. Although initially limited to prosecutors, the Supreme Court last year in *Georgia v. McCollum*¹⁴² held that the equal protection clause prohibits criminal defendants from exercising peremptory challenges on the basis of race.¹⁴³ The Supreme Court this term addressed the question of whether excluding potential jurors because of their sex is just as unlawful as disqualifying them on the basis of their race.¹⁴⁴ The plaintiff in the case, a man facing an Alabama paternity lawsuit, argued his rights were violated when an all-female jury decided he was the child's father and he had to pay child support. The Court ruled that "gender, like race, is an unconstitutional proxy for juror competence and impartiality."¹⁴⁵ Because the practice serves to perpetuate archaic stereotypes about the relative abilities of men and women, and because the state has no "exceedingly persuasive" justification for allowing the discrimination, the state fails to meet the heightened scrutiny standard.¹⁴⁶

As to the second vehicle for triggering strict scrutiny, namely fundamental rights, the Court has long recognized the constitutional right of citizens to create and develop political parties, and to exercise their right to vote. The right is derived from the First Amendment and has also been held to be protected as a

139. *Id.* at 2654.

140. The reference to a racial classification as "suspect" apparently originated with *Korematsu v. United States*, 323 U.S. 214 (1944).

141. *Mississippi Univ. for Women v. Hogan*, 458 U.S. 718 (1982) (gender discrimination); *Mills v. Habluetzel*, 456 U.S. 91 (1982) (illegitimacy).

142. 112 S. Ct. 2348 (1992).

143. *Id.* at 2359.

144. *J.E.B. v. Alabama ex rel. T.B.*, 114 S. Ct. 1419 (1994).

145. *Id.* at 1421.

146. *Id.* at 1426-27.

fundamental right under the Equal Protection Clause.¹⁴⁷ Thus, in *Norman v. Reed*,¹⁴⁸ the Court held that restrictions limiting the access of new parties to the ballot must be narrowly drawn to advance a state interest of compelling importance.¹⁴⁹ The Illinois statute required new parties, such as the Harold Washington Party, to obtain 25,000 signatures from each of the county's two districts in order to appear on the county ballot. Because this was more rigorous than the rule governing access to the state ballot, the law was held to be unconstitutional.¹⁵⁰

In *Gallagher v. Election Board*,¹⁵¹ the Indiana Supreme Court considered the validity of an Indiana statute limiting the voting rights of those who move from one precinct to another within thirty days of an election. The law requires voters who move to a new precinct to have their registration transferred to that new precinct no later than the twenty-ninth day prior to the election, which effectively disenfranchises newcomers. The statute provides that voters who stay within the same county and complete an affidavit at the county election office requesting a transfer of registration may, however, vote in their former precinct.¹⁵² The Indiana Court of Appeals reasoned that because the statute adversely affected the fundamental right to vote, the state had to demonstrate a compelling interest for its distinctions, which it failed to do.¹⁵³ The Indiana Supreme Court reversed, finding that the lower court erred in applying strict scrutiny and in ignoring United States Supreme Court decisions that have recognized the validity of reasonable residency requirements.¹⁵⁴ Although accepting the notion that the right to vote is fundamental, it found that citizens do not enjoy a fundamental right to vote in a precinct in which they do not reside. Thus, the Indiana statute needed only to survive rational basis analysis.¹⁵⁵ Because an individual who changes counties has a "more attenuated" interest in local elections than an individual who locates within the same county where the legislative district is likely to remain the same, Indiana has a rational

147. See, e.g., *Harper v. Virginia Bd. of Elections*, 383 U.S. 663 (1966).

148. 112 S. Ct. 698 (1992).

149. *Id.*

150. *Id.* at 708. Cf. *Burdick v. Takushi*, 112 S. Ct. 2059 (1992), holding that Hawaii's blanket prohibition on write-in voting does not unreasonably infringe upon its citizens' rights under the First Amendment. Since the state's ballot access laws imposed only reasonable burdens on First Amendment rights, any prohibition against write-in voting was presumptively valid and was counterbalanced by the state's interest in maintaining the integrity of the democratic system. A few years ago, in *Paul v. Indiana Election Bd.*, 743 F. Supp. 616 (S.D. Ind. 1990), a similar provision in the Indiana Code was struck as unconstitutional. Assuming Indiana law is similar to ballot access provisions in Hawaii, arguably a prohibition on write-in voting would be presumptively valid.

151. 598 N.E.2d 510 (Ind. 1992), *cert. denied*, 113 S. Ct. 1051 (1993).

152. *Id.* at 512.

153. *Id.* at 514, referring to *Gallagher*, 579 N.E.2d at 652-53.

154. 598 N.E.2d at 514.

155. *Id.* at 514-15.

basis in making this classification.¹⁵⁶ Further, the requirement that the intra-county voter execute the required transfer affidavit in order to exercise one's franchise in the former precinct rationally serves the state's interest in keeping accurate records.¹⁵⁷ Thus, the court sustained the Indiana statute in its entirety.

D. Free Speech and Association

A significant number of United States Supreme Court, as well as lower court, decisions addressed important First Amendment issues. The Court, for the second time in two years, tackled the difficult question of whether the First Amendment should protect harmful speech, especially hate speech. In addition, it decided three cases exploring the extent to which commercial speech deserves constitutional protection. In other cases, lower courts heard First Amendment speech and association claims brought by government employees.

1. *First Amendment Protection for Harmful Speech.*—The Court has long recognized that certain types of speech are of such slight social value and so injurious to the public good that they should not be entitled to First Amendment protection. Thus, obscenity, child pornography, libelous speech,¹⁵⁸ speech that incites imminent lawless action, and fighting words have been deemed to fall outside the protection of the First Amendment.¹⁵⁹ Nonetheless, in *R.A.V. v. City of St. Paul*,¹⁶⁰ the Court held that even if the city's bias-motivated ordinance was construed to prohibit only arguably unprotected fighting words, because the statute banned only a certain category of fighting words, *i.e.*, those that would arouse resentment on the basis of race, color, creed, religion, or gender, this was an impermissible content-based restriction on speech.¹⁶¹ The ordinance prohibited speakers who expressed views on the disfavored subjects

156. *Id.* at 515.

157. *Id.* at 516.

158. Even libelous speech receives some protection. The Supreme Court has held that where a public figure or public official is the object of libelous statements, the public official must prove, by clear and convincing evidence, that the material was published with actual malice, *i.e.*, knowledge that it was false, or reckless disregard for whether it was false or not, in order to recover any damages. See *Heeb v. Smith*, 613 N.E.2d 416 (Ind. Ct. App. 1993) (defamation action by former superior court judge against attorney and president of county bar association was precluded because statements made were substantially true and there was thus no actual malice as required for a public figure to recover). Cf. *Henrichs v. Pivarnik*, 588 N.E.2d 537 (Ind. Ct. App. 1992) (the element of actual malice was established with convincing clarity as a matter of law, thus supporting the trial court's summary judgment order on behalf of the former Indiana Supreme Court Justice).

159. LAURENCE H. TRIBE, *AMERICAN CONSTITUTIONAL LAW* § 12-8 at 837-38 (2d ed. 1988).

160. 112 S. Ct. 2538 (1992).

161. *Id.* at 2547. The concern with content neutrality also led to the invalidation of an Indiana statute that exempted newspapers from sales tax. In *Emmis Publishing Co. v. Department of State Revenue*, 612 N.E.2d 614 (Ind. Tax Ct. 1993), the court held that the statutory definition of newspaper as limited to publications "published for the dissemination of news of importance and of current interest to the public" discriminated on the basis of the content of speech and thus was incompatible with the purposes of the First Amendment.

of race, color, creed, religion, or gender, while permitting expression containing abusive invectives addressing other topics. Although the protection of the human rights of members of groups who have been subject historically to discrimination is a compelling government interest, the strict scrutiny standard could not be met because there are content-neutral ways to advance that interest.¹⁶²

By focusing on the content neutrality problem, Justice Scalia, joined by four Justices, failed to resolve the core question raised in the certiorari petition, namely whether words that merely inflict injury to sensibilities are unprotected or whether the Court should retain the more traditional, narrow definition of fighting words as limited to one-on-one incitements to violence. Four Justices, concurring separately, reasoned that the Minnesota Supreme Court had misconstrued earlier case precedent to include as fighting words "expressive activity caus[ing] [merely] hurt feelings, offense, or resentment," and concluded that the statute was constitutionally overbroad.¹⁶³ Thus far, Indiana courts have applied the more narrow definition of fighting words and therefore have not addressed this issue.¹⁶⁴

Less than twenty-four hours after the *R.A.V.* decision was handed down, the Wisconsin Supreme Court invalidated its "hate enhancement" statute, which increased the penalty for offenses in which the victim was intentionally selected on the basis of race, color, religion, disability, sexual orientation, national origin, or ancestry. The Wisconsin court found that the enhancement provision threatened to chill free speech and that it stepped into the realm of "subjective mental thought."¹⁶⁵ Disagreeing, the United States Supreme Court in *Wisconsin v. Mitchell*¹⁶⁶ unanimously held that enhancing Mitchell's conviction for aggravated battery from two to four years did not violate his First Amendment rights.¹⁶⁷ Justice Rehnquist emphasized that the statute punished the act of selection rather than thought, and that assaultive behavior was not the type of

162. 112 S. Ct. at 2550. The Court stated that laws which selectively proscribe fighting words are presumptively invalid. *Id.* at 2542. The city argued that content-neutral means would not accomplish its purpose, which was to register its strong disapproval of this type of speech and to clarify that such speech would not be tolerated in that community. Justice Scalia reasoned that it was precisely this message which the government could not convey unless it met strict scrutiny. *Id.* at 2550.

163. 112 S. Ct. at 2559-60.

164. See *Price v. State*, 600 N.E.2d 103, 108 n. 6 (Ind. Ct. App. 1992), *rev'd on other grounds* 622 N.E.2d 954 (Ind. 1993) (adopting the narrow definition of fighting words in construing the state's prohibition of "unreasonable noise" in its disorderly conduct statute). The court's treatment of the state constitutional challenge to this statute is discussed *supra* notes 12-18 and accompanying text. See also *Robinson v. State*, 588 N.E.2d 533 (Ind. Ct. App. 1992) (even if such words as "get the fuck away," "bullshit," and "mother-fucker" may be tolerated or in common usage by a certain segment of society, they still constitute fighting words which "tend to incite an immediate breach of peace").

165. 486 N.W.2d 807, 811 (Wis. 1992).

166. 113 S. Ct. 2194 (1993).

167. *Id.* at 2202.

expressive conduct that could be considered as protected speech. He noted that sentencing judges traditionally have had discretion to consider a wide variety of factors, including bad motive for committing a crime, provided they do not consider a defendant's abstract beliefs.¹⁶⁸ *R.A.V.* was distinguished as a case where the ordinance was explicitly directed at expression, while the Wisconsin statute "is aimed at conduct unprotected by the First Amendment."¹⁶⁹ The Court found that the "State's desire to redress these perceived harms provides an adequate explanation for its penalty-enhancement provision over and above mere disagreement with offenders' beliefs or biases."¹⁷⁰

Further, Justice Rehnquist rejected plaintiff's argument that the statute was constitutionally overbroad because of its chilling effect on free speech. This argument presupposes that persons would suppress unpopular, bigoted opinions for fear that if they later committed offenses covered by the statute, such opinions would be offered at trial to establish motive. Justice Rehnquist concluded that such a hypothesis was too speculative to support an overbreadth claim, and that, in any event, the First Amendment "does not prohibit the evidentiary use of speech to establish the elements of a crime or to prove motive or intent."¹⁷¹ A "hate enhancement" bill was enacted by the Indiana legislature during the 1994 session.

2. *Commercial Speech*.—Although the Court previously deemed this category to be unprotected, it held that consumers have a right to receive truthful communication, and thus commercial speech should be entitled to some, albeit less, protection than non-commercial speech.¹⁷² Deceptive or misleading commercial speech or that which counsels illegal action may be prohibited, and other types of commercial speech may be regulated provided the government demonstrates a substantial interest that is directly promoted by its regulation.¹⁷³ The question of how much government regulation of commercial speech should be allowed in light of its less protected status has proved to be troublesome. In *Posadas de Puerto Rico Associates v. Tourism Co. of Puerto Rico*,¹⁷⁴ the Supreme Court held that even a content-based statute singling out advertising of gambling parlors is valid because it serves a substantial state interest in reducing the demand for casino gambling by Puerto Rican residents and because it is no more extensive than necessary.¹⁷⁵

This past term, in *United States v. Edge Broadcasting Co.*,¹⁷⁶ the Supreme Court sustained a federal statute that criminalized television and radio broadcast-

168. *Id.* at 2199-2200.

169. *Id.* at 2201.

170. *Id.*

171. *Id.*

172. *Virginia Pharmacy Bd. v. Virginia Consumer Council, Inc.*, 425 U.S. 748, 773 (1976).

173. *Central Hudson Gas & Elec. Corp. v. Public Serv. Comm'n*, 447 U.S. 557 (1980).

174. 478 U.S. 328 (1986).

175. *Id.* at 348.

176. 113 S. Ct. 2696 (1993).

ing of lottery advertisements by licensees who operate in a state that prohibits lotteries.¹⁷⁷ Edge Broadcasting is a Virginia corporation licensed by North Carolina, and it broadcasts from a small town three miles south of the Virginia border. Virginians comprise more than ninety-two percent of its audience, but because North Carolina does not sponsor a lottery, the federal statute compels Edge to refrain from contracting with Virginia for broadcast of advertisements promoting Virginia's lottery.¹⁷⁸ Edge argued that the federal restriction did not advance the asserted government interest because North Carolinians already experienced pervasive exposure to Virginia lottery advertising through television, broadcast, and print media based in Virginia. The Court nonetheless sustained the federal statute. The Court found that the federal government had a substantial interest in supporting the policy of non-lottery states, while at the same time not interfering with the policy of states that permit lotteries.¹⁷⁹ In commercial speech cases, the Court has held that the means must merely be reasonably related to promoting the government interest, and here the government advanced its purpose by reducing lottery advertising, even when such advertising was "not wholly eradicated."¹⁸⁰

Although the analysis in *Edge Broadcasting* suggests that the Supreme Court does not provide much protection for commercial speech, in two other cases this term the Court invalidated commercial speech restrictions. In *Cincinnati v. Discovery Network, Inc.*,¹⁸¹ the Court struck a city ordinance that prohibited the distribution of commercial handbills on public property, while allowing non-commercial newsracks. Applying the same standard used in *Edge*, the Court held that the city failed to establish a "reasonable fit" between its legitimate interest in safety and aesthetics and the discriminatory means it had chosen.¹⁸² While the city argued that its selective ban was justified because of the "less protected" status of commercial speech, Justice Stevens postulated that the city had attached more importance to the distinction between commercial and non-commercial speech than was warranted, and it had "seriously underestimate[d] the value of commercial speech."¹⁸³

Justice Stevens reasoned that because newsracks filled with commercial or non-commercial publications are equally responsible for safety concerns and visual blight, "the distinction bears no relationship *whatsoever* to the particular interests that the city has asserted."¹⁸⁴ Thus, a bare assertion of the "low value" of commercial speech will be an insufficient justification for laws that

177. *Id.*

178. 113 S. Ct. at 2702.

179. *Id.* at 2703.

180. *Id.* at 2707.

181. 113 S. Ct. 1505 (1993).

182. *Id.* at 1510.

183. *Id.* at 1511.

184. *Id.* at 1514.

discriminate against this form of speech. The case seems difficult to reconcile with *Edge Broadcasting*. One may contend that by eliminating sixty-two of Cincinnati's 2,000 newsracks that were used for purely commercial purposes, the problem of sidewalk congestion and aesthetics would be at least partially ameliorated. Although both cases arguably used a "reasonable fit" standard, the opinions by various Justices reflect continued disagreement about government's power to regulate commercial speech.

In a third commercial speech case, *Edenfield v. Fane*,¹⁸⁵ the Court invalidated a Florida statute that prohibited direct, in-person solicitation of potential clients by certified public accountants (CPAs). It found that the law failed to meet the standard that government regulation of commercial speech "be tailored in a reasonable manner to serve a substantial state interest."¹⁸⁶ The Court had little difficulty in accepting the substantiality of the state's asserted interest in protecting consumers from fraud or overreaching. It found, however, that the flat ban did not advance the state's interest; there was no study suggesting that personal solicitation of prospective business clients by CPAs created the danger of fraud or overreaching nor was there anecdotal evidence to justify this restriction.¹⁸⁷

Although the Court in 1978 sustained a similar prohibition on in-person solicitation by attorneys,¹⁸⁸ in *Edenfield* the Court reasoned that solicitation by CPAs does not pose the "same dangers" (*i.e.*, a CPA is not a professional trained in the art of persuasion) and the typical client of a CPA is far less susceptible to manipulation than young accident victims whom the state was trying to protect from attorney solicitation.¹⁸⁹ The Court emphasized that "[e]ven under the First Amendment's somewhat more forgiving standards for restrictions on commercial speech, a State may not curb protected expression without advancing a substantial government interest."¹⁹⁰ Here the Court concluded that the ends sought by the state were simply not being advanced by the speech restriction and thus *Fane's* right to speak was infringed.¹⁹¹

3. *Free Speech and Association Rights of Government Employees.*—The United States Supreme Court has held that government cannot condition employment on relinquishing First Amendment rights. In *Elrod v. Burns*,¹⁹² it held that political patronage systems wherein employees are fired simply because they are members of the wrong political party violate the Constitution.¹⁹³ In *Rutan v. Republican Party*,¹⁹⁴ the Court in 1990 extended this

185. 113 S. Ct. 1792 (1993).

186. *Id.* at 1798.

187. *Id.* at 1800.

188. *Ohralik v. Ohio State Bar Ass'n*, 436 U.S. 447 (1978).

189. *Edenfield*, 113 S. Ct. at 1802-03.

190. *Id.* at 1804.

191. *Id.*

192. 427 U.S. 347 (1976).

193. *Id.* at 374.

protection to include patronage-based decisions regarding hiring, promotion, transfer, and recall decisions. Only when the employer can demonstrate that party affiliation is an appropriate requirement for the performance of the specific job in question may an employer escape liability.¹⁹⁵ Thus, in *Matlock v. Barnes*,¹⁹⁶ the Seventh Circuit held that an investigator in the city law department was not a policy-making or a confidential employee because he had little authority, did not supervise anyone, and there was no area regarding his duties where political affiliation would affect job performance.¹⁹⁷ He could not, therefore, be terminated for political reasons.¹⁹⁸ On the other hand, in *Selch v. Letts*¹⁹⁹ the Seventh Circuit held that a Republican could be discharged from his position as a state highway subdistrict superintendent on the basis of his political affiliation.²⁰⁰ The court examined the amount and nature of the plaintiff's responsibilities, focusing attention upon whether an opposition party loyalist could threaten the policy goals of the party in power.²⁰¹ Although conceding that upper levels of management provided guidelines for the execution of plaintiff's tasks, because he could decide where and when work was to be completed, his implementation of policy would have a "substantial effect on the public's perception of the Democratic administration."²⁰² Thus, the new Democratic governor was entitled to fill the position with individuals politically loyal to him.

Although the defendant carries the burden of proving that political affiliation is a necessary prerequisite to effective job performance, the plaintiff has the initial burden of establishing that political affiliation was a motivating factor in the adverse employment decision. This proved to be a major obstacle for several Indiana litigants. In *Vukadinovich v. Board of School Trustees*,²⁰³ the Seventh Circuit held that the district court properly granted summary judgment for the defendants because no reasonable jury could conclude that a teacher's comments made two years prior to a school board's decision to terminate his employment contract were a substantial or motivating factor in the school board's decision.²⁰⁴ In *Garrett v. Barnes*,²⁰⁵ although there was sufficient evidence to

194. 497 U.S. 62 (1990).

195. *Id.* at 64 (citing *Elrod and Branti v. Finkel*, 445 U.S. 507 (1980)).

196. 932 F.2d 658 (7th Cir. 1991), *cert. denied*, 112 S. Ct. 304 (1991).

197. *Id.* at 664.

198. *Compare* *Dimmig v. Wahl*, 983 F.2d 86 (7th Cir. 1993), *cert. denied*, 114 S. Ct. 176 (1993) (Illinois deputy sheriff who was discharged due to his refusal to campaign for the sheriff has no First Amendment claim because deputies operate with sufficient autonomy and discretionary authority to justify the sheriff's use of political considerations).

199. 5 F.3d 1040 (7th Cir. 1993).

200. *Id.* at 1045-47.

201. *Id.* at 1043.

202. *Id.* at 1046.

203. 978 F.2d 403 (7th Cir. 1992).

204. *Id.* at 408-09.

205. 961 F.2d 629 (7th Cir. 1992).

conclude that a mayor was aware of an employee's endorsement of his political opponent, there was no direct or circumstantial evidence to support the employee's contention that the termination was politically motivated. The Seventh Circuit observed that mere "public perception of political machinations, innuendo, and speculation cannot be the basis of a jury verdict."²⁰⁶

When an employee's speech rather than association triggers the adverse employment action, the Supreme Court applies a balancing test to determine whether the speech rights outweigh the government's interests. In *Connick v. Myers*,²⁰⁷ the Court stated that the critical, initial question is whether the government employee's speech is a matter of public concern.²⁰⁸ The *Connick* Court characterized the plaintiff's speech as largely an internal personnel dispute—the plaintiff was angry over her transfer to another department. Consequently, the Court determined that the speech was entitled to little protection, and the defendant could justify the dismissal by merely articulating a belief in the disruptive potential of the plaintiff's conduct.²⁰⁹

Applying *Connick*, the Seventh Circuit in *Colburn v. Trustees of Indiana University*²¹⁰ found that the plaintiff's speech, which consisted of letters expressing concern about a feud within the sociology department and requesting external review of the department's peer review committee, was not a matter of public concern and was not protected by the First Amendment.²¹¹ Although the court noted that speech is not unprotected simply because it raises complaints or other issues personal to the speaker, it found that speech is not protected where the overriding reason for the speech is the concern of only a few individuals whose careers may be on the line.²¹² Similarly, in *Norris v. Board of Education*,²¹³ the district court emphasized that an employee's speech must present a matter of public concern and not merely a private dispute between parties in order to implicate the First Amendment.²¹⁴

206. 961 F.2d at 634. See also *Caldwell v. City of Elwood*, 959 F.2d 670 (7th Cir. 1992) (because government employee who claimed he was retaliated against for speaking out on matters of public concern failed to sufficiently allege that any defendant retaliated against him because of his conversation with the mayor, his complaint was properly dismissed); *Cusson-Cobb v. O'Lessker*, 953 F.2d 1079 (7th Cir. 1992) (employee's conclusory assertion that her political affiliation was well known was insufficient to overcome employer's unequivocal denial of any knowledge of employee's political affiliation prior to the discharge).

207. 461 U.S. 138 (1983).

208. *Id.* at 146.

209. *Id.* at 154.

210. 973 F.2d 581 (7th Cir. 1992).

211. *Id.* at 585-86.

212. *Id.* at 588.

213. 797 F. Supp. 1452 (S.D. Ind. 1992).

214. See also *Hartman v. Board of Trustees of Community College Dist.* 508, 4 F.3d 465 (7th Cir. 1993) (when the overriding reason for the speech, determined by its content, form and context, appears to be related to the speaker's personal interests as an employee, the speech will not be afforded protection). Cf. *Glass v. Dachel*, 2 F.3d 733 (7th Cir. 1993) (speech which discloses

Even when the speech is deemed to be a matter of public concern, the court must still balance the free speech interest of the employee against the state's interest as an employer in running an efficient operation. In *Lach v. Lake County*,²¹⁵ the Indiana Court of Appeals reversed a trial court's application of this standard. The sheriff's department contended, and the trial court found, that Lach could be disciplined for writing letters to the newspaper regarding candidates for office during a campaign because of the need to maintain discipline and morale in the sheriff's department. Although the department argued that the published comments would have a tendency to inhibit the proper performance of Lach's duties and would make it difficult for him to supervise other officers under his command, the defendant produced no evidence that Lach's comments undermined morale or discipline.²¹⁶ The trial court's unsubstantiated "inferences" were unwarranted, and thus the disciplinary action against Lach was improper.²¹⁷

In addition to the right of government employees to speak and associate freely, the Supreme Court also has recognized a right not to associate. In *Abood v. Detroit Board of Education*,²¹⁸ the Court held that the state could not force public school teachers to join a union.²¹⁹ Although it has allowed states to require payment of a service fee for collective bargaining purposes, the Court in subsequent cases has emphasized that any funds must be germane to collective bargaining and must be justified by the government's vital policy in labor peace and avoiding "free riders."²²⁰

Applying this case precedent, an Indiana appellate court in *Albro v. Indianapolis Education Ass'n*²²¹ held that the union was required to affirmatively prove chargeable expenses to establish a non-union member's fair share fee.²²² It held that lobbying expenses, political and charitable expenses (even if *de minimis*, public relations expenses), and organizing expenses were not chargeable.²²³ The *Albro* court further held that state and national affiliation

wrongdoing and a breach of the public trust is protected even if it may have been motivated in part by a personal vendetta against a superior); *Marshall v. Allen*, 984 F.2d 787 (7th Cir. 1993) (plaintiff's speech, in support of co-workers involved in a lawsuit alleging gender discrimination by employer, an Illinois public agency, involved a matter of public concern); *Churchill v. Waters*, 977 F.2d 1114 (7th Cir. 1992), *cert. granted*, 113 S. Ct. 2991 (1993) (plaintiff's speech regarding hospital's failure to properly educate and train nurses in highly specialized areas is clearly a matter of public concern; hospital may be liable even if, due to inadequate investigation, it had at the time of discharge insufficient knowledge of the content of the speech to realize its protected status).

215. 621 N.E.2d 357 (Ind. Ct. App. 1993).

216. *Id.* at 359.

217. *Id.* at 359-60.

218. 431 U.S. 209 (1977).

219. *Id.* at 242.

220. *Lehnert v. Ferris Faculty Ass'n*, 111 S. Ct. 1950 (1991).

221. 585 N.E.2d 666 (Ind. App. 1992).

222. *Id.* at 669.

223. *Id.* at 672.

expenses were chargeable only to the extent that the benefit inured to members of the local union.²²⁴ The Indiana Supreme Court adopted this opinion in its entirety in *Fort Wayne Education Ass'n, Inc. v. Aldrich*,²²⁵ reversing a lower court decision that sustained the union's proposed method of calculating fair share fees.

E. Freedom of Religion

1. *The Establishment Clause*.—Proceeding on the premise that the proper role of government is to maintain a position of neutrality vis-a-vis religion, the Supreme Court in *Lemon v. Kurtzman*²²⁶ recognized that the Establishment Clause required government programs to share three characteristics: (1) the program must have a secular purpose; (2) the primary effect must neither advance nor inhibit religion; and (3) the program cannot create excessive entanglement between church and state.²²⁷

In recent years, several Justices have vociferously argued that the *Lemon* test is too restrictive and that it should be replaced by a more "accommodationist" approach to church-state questions, but, thus far, a majority has refused to overturn the decision.²²⁸ In *Lee v. Weisman*,²²⁹ the Court, in a five to four decision, rejected the Solicitor General's invitation to give government greater freedom to inject religion into its activities and policies. While not specifically addressing the *Lemon* factors, the majority held that the Establishment Clause outlaws the practice of public schools' inviting clergy to deliver non-sectarian prayers at graduation ceremonies.²³⁰ Justice Kennedy found that graduation prayers "bore the imprint of the State and thus put school-age children who objected in an untenable position."²³¹ He emphasized the heightened concern with protecting freedom of conscience from subtle, coercive pressure in the elementary and secondary school setting.²³²

Citing *Lee*, the Seventh Circuit in *Berger v. Rensselaer Central School Corp.*²³³ held that an Indiana public school district violated the Establishment Clause by permitting representatives of Gideon International to distribute Bibles

224. *Id.* at 671-74.

225. 594 N.E.2d 781 (Ind. 1992).

226. 403 U.S. 602 (1971).

227. *Id.* at 612-13.

228. *See infra* notes 242-43 and accompanying text.

229. 112 S. Ct. 2649 (1992).

230. *Id.* at 2661.

231. *Id.* at 2657.

232. Despite *Lee*, in *Jones v. Clear Creek Indep. Sch. Dist.*, 977 F.2d 963 (5th Cir. 1992), *cert. denied*, 113 S. Ct. 2950 (1993), the Fifth Circuit sustained a public school district's resolution permitting high school seniors to deliver non-sectarian, non-proselytizing invocations at graduation ceremonies. The court reasoned that its conduct did not coerce students' participation in religion, and therefore did not violate the Establishment Clause.

233. 982 F.2d 1160 (7th Cir. 1993), *cert. denied*, 113 S. Ct. 2344 (1993).

to elementary school children during instructional time, notwithstanding the school district's policy of equal access for all speakers.²³⁴ Although the district court had sustained the practice, saying it was no more offensive than allowing other groups, such as the Little League, into classrooms,²³⁵ the appellate court found that this practice bore the *imprimatur* of state involvement in religion.²³⁶ Further, a public school could not sanctify such an endorsement of religion by simultaneously sponsoring non-religious speech. In short, the Establishment Clause trumps the free speech clause "in the coercive context of public schools."²³⁷

The Seventh Circuit's holding in *Berger* should be compared to this term's Supreme Court decision in *Lamb's Chapel v. Center Moriches School District*.²³⁸ In *Lamb's Chapel*, the school board relied upon the Establishment Clause to refuse requests by plaintiffs to use school facilities *after hours* for a religious-oriented film series on Christian family values. The school corporation allowed social, civic, and recreational use of its facilities after school hours, but denied any use for religious purposes.²³⁹ The Court unanimously found that this discrimination violated free speech rights and that the asserted Establishment Clause defense was faulty.²⁴⁰ Applying the *Lemon* analysis, the Court found no realistic danger that the community would believe the district was endorsing religion or any particular creed by merely allowing after-hours use of its facility.²⁴¹ Further, any benefit to religion or to the church would have been incidental.²⁴²

Three Justices, concurring in the judgment, wrote separately to challenge the majority's citation to *Lemon*. Justice Scalia described *Lemon* as "some ghoul in a late-night horror movie that repeatedly sits up in its grave and shuffles abroad, after being repeatedly killed and buried."²⁴³ He noted that five of the current sitting Justices have already personally "driven pencils through the creature's heart," and yet the *Lemon* opinion continues to "stalk" Establishment Clause jurisprudence.²⁴⁴ Justice Scalia argued that the Establishment Clause should not be read to forbid nondiscriminatory access to school facilities provided the practice "does not signify state or local embrace of a particular religious sect."²⁴⁵

234. *Id.* at 1171.

235. *Id.*

236. *Id.* at 1166.

237. *Id.*

238. 113 S. Ct. 2141 (1993).

239. *Id.* at 2144.

240. *Id.* at 2148.

241. *Id.*

242. *Id.*

243. *Id.* at 2149 (Scalia, J., concurring).

244. *Id.* at 2149-50.

245. *Id.* at 2151.

The significance of the Court's refusal to bury *Lemon* is reflected in the recent Seventh Circuit decision of *Gonzales v. North Township of Lake County*.²⁴⁶ In *Gonzales*, plaintiffs challenged a local township's display of a crucifix in its public park. The defendants argued that the crucifix was a war memorial, and its presence on public property did not violate the Establishment Clause. The Seventh Circuit began by noting that, "[a]lthough the test is much maligned, the Supreme Court recently reminded us that *Lemon* is controlling precedent and should be the framework used by courts when reviewing Establishment Clause challenges."²⁴⁷ Applying the first prong of *Lemon*, the court rejected the township's claim that the crucifix was intended to act as a war memorial. Because the township failed to offer any evidence showing that the crucifix ever had been used for memorial purposes, and the history suggests that the goal was to spread the Christian message throughout Lake County, the court held that the primary purpose was religious.²⁴⁸ Further, even if the township displayed a sign dedicating the symbol to "our honored dead," it still could not free itself from the constitutional requirement that a secular purpose be demonstrated.²⁴⁹

Concerning *Lemon*'s second requirement, the court held that "the crucifix's presence in the Park convey[ed] the primary message of the Township's endorsement of Christianity."²⁵⁰ The Seventh Circuit distinguished previously sustained government displays of religious messages by pointing out that the crucifix did not "bear secular trappings sufficient to neutralize its religious message."²⁵¹ Further, unlike seasonal displays or displays having historical significance, the township had a permanent symbol displayed in a prominent public area that endorsed religion and thus violated the Establishment Clause.²⁵²

Despite the Supreme Court's apparent refusal to bury *Lemon*, the accommodationist proponents won a victory in the high court last term. In *Zobrest v. Catalina Foothills School District*,²⁵³ the Court held five to four that the Establishment Clause does not bar a public agency from providing a sign-language interpreter to a deaf child in a private, sectarian high school.²⁵⁴ Using the *Lemon* analysis, most forms of "parochialism" since the 1970s have been

246. 4 F.3d 1412 (7th Cir. 1993).

247. *Id.* at 1417-18.

248. *Id.* at 1421.

249. *Id.*

250. *Id.* at 1422.

251. *Id.* at 1423.

252. *Id.* The court goes on to note that, as to the third prong, the record did not show any contact between the township and the Knights of Columbus who originally donated the crucifix, and thus it could not find excessive entanglement in religion by virtue of the crucifix merely standing in Wicker Park.

253. 113 S. Ct. 2462 (1993).

254. *Id.* at 2469.

disallowed as either impermissibly advancing religion or creating excessive entanglement between Church and State.²⁵⁵ Nonetheless, in *Zobrest*, five Justices held that government programs that neutrally provide benefits to a broad class of citizens (here, students with disabilities) should not be invalidated just because sectarian institutions also may receive an attenuated financial benefit.²⁵⁶ Without invoking the *Lemon* test, the majority reasoned that the public subsidy created no financial incentive for parents to choose a sectarian school, and because the aid was not skewed towards religion, the service did not offend the Establishment Clause.²⁵⁷ Deaf children, not sectarian schools, were the primary beneficiaries. In addition, because the parents chose of their own free will to place their child in a pervasively sectarian environment and because the interpreter they requested would neither add to or subtract from that environment, the Establishment Clause did not bar the assistance.²⁵⁸ Although the interpreter clearly was the conduit for the religious message, the Court took great care in emphasizing all the special features that insulated this form of assistance from the fate of earlier "parochial" programs.²⁵⁹ Further, the Court did not overrule the much-maligned *Lemon* decision. Thus, *Zobrest*'s precedential effect may be quite narrow, and the state of Establishment Clause jurisprudence remains uncertain.

2. *Free Exercise Clause*.—Free exercise claims usually arise when one is seeking an exemption from a neutral, generally applicable law, the aim of which is non-religious, but which conflicts with the tenets of a religion, either preventing a religious practice or compelling forbidden conduct. The Supreme Court has held that where the government practice significantly interferes with free exercise rights, the government has to show an overriding interest. Additionally, the government must show that granting a religious exemption would frustrate that interest.²⁶⁰ In recent years, however, the Court strayed from applying heightened scrutiny to free exercise claims. In *Employment*

255. The Court's holdings in this area, however, are not entirely consistent. While the Court has sustained the use of public funds for secular textbooks, it has invalidated aid for slide projectors, tape recorders or record players. It has allowed parochial schools to receive the benefit of speech and hearing therapists on school premises, but not remedial teachers or counselors. See Rosalie Berger Levinson, *Separation of Church and State*, 18 VAL. U. L. REV. 707, 713-14 (1984).

256. *Zobrest*, 113 S. Ct. at 2467-68.

257. 113 S. Ct. at 2467. Although the Court does not cite *Lemon*, it relies on two earlier Supreme Court cases where the decisions were reached using the *Lemon* framework.

258. *Id.* at 2468.

259. *Id.* at 2466-69.

260. See, e.g., *Sherbert v. Verner*, 374 U.S. 398 (1963) (A Seventh Day Adventist was impermissibly denied unemployment compensation benefits because of her refusal to take a job requiring Saturday work; plaintiff must be granted an exemption from the normal requirement that employees seeking unemployment be "available" for work); *Wisconsin v. Yoder*, 406 U.S. 205 (1972) (Amish must be granted exemption from state compulsory school attendance law because the state cannot show that granting an exemption to the Amish would impair its compelling interest in an informed citizenry).

Division, Department of Human Resources of Oregon v. Smith,²⁶¹ the Court determined that when generally applicable statutes are not specifically directed to religious practices, they need not be subject to strict scrutiny review.²⁶² Applying a “reasonableness” standard, the Court in *Smith* held that Native American Indians could be criminally prosecuted under generally applicable drug laws for the sacramental use of peyote.²⁶³

The *Smith* opinion triggered significant alarm regarding the fate of religious liberty. In *Church of Lukumi Babalu Aye, Inc. v. Hialeah*,²⁶⁴ three Justices (Souter, Blackmun, and O’Connor) argued in a concurring opinion that *Smith* was wrongly decided and should be overturned.²⁶⁵ The majority opinion, however, specifically cited *Smith* as good law,²⁶⁶ although it struck the municipal ordinance in question as not facially neutral.²⁶⁷ In *Church of Lukumi*, the city claimed it had enacted neutral ordinances prohibiting the sacrificial killing of animals, and that *Smith* was controlling. The record, however, did not support its argument.

Some 60,000 members of the Church of Lukumi Babalu Aye live in southern Florida where they practice a religion that calls for animal sacrifices at birth, marriage, and death rites. The church also sacrifices animals in curing the sick and for the initiation of new members and priests. When the group sought a permit from the city to build a church, the city responded by enacting ordinances banning this practice. Although the majority maintained that neutral laws of general applicability need not be justified by a compelling government interest even if they incidentally burden religious practices, they found in this case that the patchwork of prohibitions and exemptions in the municipal ordinances illustrated that suppression of the central element of the Santeria worship service was the object of the legislation.²⁶⁸ Thus, the laws had to be subject to “the most rigorous of scrutiny.”²⁶⁹ Because the city permitted the killing of animals for virtually any other purpose, including sport, food, and convenience, and because the statutes were both over- and under-inclusive in substantial respects, the city failed to meet its burden of proving that the ordinances were enacted to serve the city’s compelling interests in protecting public health and preventing animal cruelty.²⁷⁰

Although the *Hialeah* decision left intact the *Smith* holding, the opinion recently met its demise with passage of the Religious Freedom Restoration Act,

261. 494 U.S. 872 (1990).

262. *Id.* at 889.

263. *Id.* at 890.

264. 113 S. Ct. 2217 (1993).

265. *Id.* at 2240 (Souter, J., concurring); *id.* at 2250 (Blackmun, J., O’Connor, J., concurring).

266. *Id.* at 2226.

267. *Id.* at 2227-28.

268. *Id.* at 2228-29.

269. *Id.* at 2233.

270. *Id.* at 2229.

which reinstates pre-*Smith* law, by creating a federal statutory right that subjects all threats to religious liberty to rigid scrutiny.²⁷¹

271. P.L. 103-141 was signed into law on Nov. 16, 1993 (current version at 42 U.S.C. § 2000bb (1993)).

THE INDIANA BUSINESS FLEXIBILITY ACT (LIMITED LIABILITY COMPANIES)

DAVID C. WORRELL*

MARCI A. REDDICK**

INTRODUCTION

The limited liability company (LLC) movement spread rapidly and throughout the United States. With the enactment of the Indiana Business Flexibility Act (the Act),¹ Indiana joined the majority of other jurisdictions in authorizing LLCs as a new form of business association. As recently as 1989, only two United States jurisdictions authorized LLCs. As of this writing, thirty-eight additional states have enacted statutes authorizing LLCs.

The LLC represents an alternative to the corporation and partnership. In some respects, the LLC may be viewed as a hybrid of the two. One commentator has described the LLC as an entity possessing the corporate characteristic of limited liability, but with the added ability to conduct its affairs as a partnership.² More to the point, it is the unique combination of limited liability for owners with the LLC's ability to be classified as a partnership for federal income tax treatment³ that is the primary reason for the proliferation of LLCs.⁴

The purpose of this Article is to provide background information on LLCs, explain key issues involved in determining whether an LLC will be classified as a partnership for tax purposes, review substantive provisions of the Act, and comment on the possible uses of LLCs.

* Partner, Baker & Daniels. A.B., 1973, Wabash College; J.D., 1976, University of Chicago Law School.

** Associate, Baker & Daniels. B.A., 1977, Indiana University; J.D., 1984, Indiana University School of Law—Indianapolis. The authors were members of the task force that was primarily responsible for drafting the Act.

1. IND. CODE ANN. §§ 23-18-1-1 to -13-1 (West 1994).

2. Richard Johnson, Comment, *The Limited Liability Company Act*, 11 FLA. ST. U. L. REV. 387, 387 (1983).

3. The LLC joins the partnership and S corporation as a "pass-through" entity for federal income tax purposes.

4. See Robert R. Keatinge et al., *The Limited Liability Company: A Study of the Emerging Entity*, 47 BUS. LAW. 378 (1992); James W. Lovely, *Agency Costs, Liquidity, and the Limited Liability Company as An Alternative to the Close Corporation*, 21 STETSON L. REV. 377 (1992).

I. BACKGROUND OF LLCs

A. History of LLCs

Several commentators have traced the history of business associations similar to LLCs under a variety of laws outside of the United States. These LLC analogues include the English "private company," the French "SARL," the South American "limitada," and the German "GmbH."⁵

In the United States, LLCs find their genesis in the 1977 Wyoming Limited Liability Company Act.⁶ Florida's 1982⁷ statute is similar to Wyoming's. Following publication in 1988 of a revenue ruling by the Internal Revenue Service (IRS) that a Wyoming LLC would be classified as a partnership for federal income tax purposes,⁸ numerous other jurisdictions adopted their version of an LLC statute. The total number of states with LLC statutes is forty.⁹

B. Common Traits of LLCs

Although there are significant differences among the various state LLC statutes, there are certain general traits that mark this emerging form of business association. Fundamentally, an LLC is a non-corporate entity whose owners (typically termed "members") are generally not personally liable for the entity's debts or obligations. This shorthand description touches two important bases. First, the LLC is not a corporation. An LLC resembles a partnership in many respects, including such matters as formalities of organization, governance,

5. See Lovely, *supra* note 4, at 536; Keatinge, *supra* note 4, at 378.

6. 1992 WYO. SESS. LAWS 512.

7. FLA. STAT. ANN. § 608.401-77 (West Supp. 1991).

8. Rev. Rul. 88-76, 1988-2 C.B. 360.

9. ALA. CODE §§ 10-12-1 to 10-12-61 (1993); ARIZ. REV. STAT. ANN. §§ 29-601 to 29-857 (1992); ARK. CODE ANN. §§ 4-32-101 to 4-32-1318 (Michie Supp. 1993); COLO. REV. STAT. §§ 7-80-101 to 7-80-913 (1992); 1993 CONN. LEGIS. SERV. P.A. NO. 93-267; DEL. CODE ANN. title 6, §§ 18-101 to 18-1107; FLA. STAT. ANN. §§ 608.401-608.471 (1993); GA. CODE ANN. § 14-11-100 to 14-11-1109 (1993); IDAHO CODE § 53-601 to 53-672 (1993); ILL. REV. STAT. §§ 1-1 to 55-10 (1992); IND. CODE ANN. §§ 23-18-1-1 to 23-18-13-1 (West 1994); IOWA CODE §§ 490 A.100 to 490 A.1601 (1992); KAN. STAT. ANN. § 17-7601 to 17-7650 (1993); KY. S.B. 184 (1994); LA. REV. STAT. ANN. §§ 1301 to 1369 (1992); P.L. 718, 116th Leg., 2d Reg. Sess. 1994 Maine; MD. CODE ANN. §§ 4A.101 to 4A.1103 (1992); MICH. COMP. LAWS § 450.4101 to 450.5200 (1993); MINN. STAT. §§ 322B.01 to 372B.95 (1992); MISS. CODE ANN. § 79-6-1 (1993); MO. REV. STAT., S.B. 66 and 20 (1993); MONT. CODE ANN. Ch. 120, §§ 1-78 (1993); NEB. REV. STAT. § 121 § 1-45 (1993); NEV. REV. STAT. §§ 86.011 to § 86.571 (1992); N.H. REV. STAT. ANN. § 304-C:1 - § 510.13 (1993); N.J. STAT. §§ 42:213-1 to 42:213-70; N.M. STAT. ANN. § 53-19-1 to 53-19-74 (1993); N.C. GEN. STAT. § 57C-1-01 (1993); N.D. CENT. CODE § 10-32-01 to 10-32-155; Sub. S.B. 74, 120th Gen. Ass. 1993-94 Reg. Sess. Ohio; OKLA. STAT., tit. 18, §§ 2000-2060 (1992); OR. REV. STAT. Ch. 63.001 (1993); R.I. GEN LAWS § 7-16-1 to 7-16-75 (1992); S.D. CODIFIED LAWS §§ 47-34-1 to 47-34-53 (1993); TEX. REV. CIV. STAT. art. 1528 n. arts. 1.01-9.02 (1992); UTAH CODE ANN. §§ 48-2b-101 to 48-2b-157 (1992); VA. CODE ANN. §§ 13.1-1000 to 13.1-1073 (1993); W.VA. CODE § 31-1A-1 to 31-1A-69 (1992); WIS. STAT. ANN. § 820 (1993); and WYO. STAT. §§ 17-15-101 to 17-15-136 (1992).

capital structure and events requiring dissolution of the entity. As a non-corporate entity, the LLC stands outside of the extensive body of statutory and judicial law regulating corporations. Second, the feature of limited liability places considerable distance between the LLC and the partnership. In an LLC, both the members and other persons, if any, managing the LLC (managers) are not personally liable for the LLC's debts and obligations. A fundamental aspect of partnerships—both general and limited—is that at least one partner must be personally liable for the partnership's debts and obligations.¹⁰

However, these distinctions do not explain why so many states have adopted statutes authorizing LLCs. The LLC movement is largely tax-driven. An LLC can qualify for classification as a partnership for federal income tax purposes. As a “pass-through” entity, the LLC itself, like a partnership, is not subject to federal income tax. Rather, all items of income, losses, credits and deductions pass through and are reported by the entity's owners. The 1986 adoption of lower rates for individuals and the repeal of the *General Utilities* doctrine are believed to have enhanced the attractiveness of a pass-through entity for business planning purposes.¹¹

In most contexts, the LLC represents a better pass-through entity than the more traditional alternatives: the general partnership, the limited partnership, and the S corporation. There are two major advantages of LLCs over partnerships. First, unlike general partners of a general or a limited partnership, the members and managers of an LLC possess limited liability. Second, investors in an LLC can actively participate in the management of the firm without losing this protection unlike a limited partner who participates in the “control” of a limited partnership.¹²

There are many advantages that an LLC has in comparison to an S corporation. Unlike an S corporation, an LLC is not subject to restrictions with respect to the number and the type of its owners. Generally, an S corporation may have no more than thirty-five owners, all of whom must be individuals, estates, or certain qualified trusts.¹³ An LLC may have the same flexible capital structure as a partnership. Special allocations of profits and losses are possible, subject to the “substantial economic effect” tests of the Internal Revenue Code.¹⁴ In contrast, an S corporation may have only a single class of stock (although two classes of stock whose only difference is that one has voting rights is permissible).¹⁵ Another difference is that a member of an LLC may

10. *E.g.*, IND. CODE ANN. §§ 23-4-1-15; -16-5-3 (West 1994).

11. Keatinge et al., *supra* note 4, at 380.

12. *E.g.*, IND. CODE ANN. § 23-16-4-3(a)(2) (West 1994).

13. I.R.C. § 1361(b)(1)(B) (1993).

14. *Id.* § 704(b). An explanation of the situations in which special allocations will have substantial economic effect is beyond the scope of this Article. See LARRY E. RIBSTEIN & ROBERT R. KEATINGE, RIBSTEIN AND KEATINGE ON LIMITED LIABILITY COMPANIES at § 17.07 (1992).

15. I.R.C. §§ 1361(b)(1)(B); (c)(4) (1993).

increase the tax basis of his or her ownership interest for the entity's liabilities, while a shareholder of an S corporation cannot.¹⁶ Finally, an LLC, unlike an S corporation, may own more than eighty percent of corporate subsidiaries.¹⁷

These advantages suggest that the LLC may well become the "entity of choice" in business planning contexts that favor a pass-through entity.

II. CLASSIFICATION OF LLCS FOR TAX PURPOSES

A. Classification Analysis

In Revenue Ruling 88-76,¹⁸ the IRS extended the traditional analysis used to determine whether an unincorporated organization is taxed as a partnership or corporation to a Wyoming LLC. This analysis focused on the presence of four relevant characteristics to determine corporate status: (a) continuity of life; (b) free transferability of interests; (c) centralized management; and (d) limited liability.¹⁹ Under this analysis, an entity with more than two of these characteristics cannot be classified as a partnership. An LLC will have the corporate characteristic of limited liability. Accordingly, to qualify as a partnership for federal tax purposes, an LLC must not have more than one of the three remaining corporate characteristics.

In Revenue Ruling 88-76, an LLC formed under the Wyoming statute was found to lack continuity of life and free transferability of interests and, therefore, was classified as a partnership. This analysis has also been applied in a number of subsequent revenue rulings addressing other state LLC laws.²⁰ In regulations, published rulings, and a number of private letter rulings, the IRS has addressed classification and other LLC-related issues at length. Although the IRS has not yet publicly addressed the Act,²¹ the same analysis contained in Revenue Ruling 88-76 should apply to an LLC created under the Act, with one reservation. Unlike the Wyoming, Florida, and other "first generation" or

16. *Id.* § 752.

17. *Id.* §§ 1361(b)(2)(A); 1504(a).

18. 1988-2 C.B. 360.

19. See Treas. Reg. § 301.7701-2(a)(1) (1993). Two other characteristics—"associates" and an "objective to carry on a business and divide the gains"—are shared by partnerships and corporations and, accordingly, are not considered for classification purposes.

20. Rev. Rul. 94-6, 1994-3 I.R.B. 11 (Alabama); Rev. Rul. 93-93, 1993-42 I.R.B. 13 (Arizona); Rev. Rul. 93-6, 1993-1 C.B. 229 (Colorado); Rev. Rul. 93-38, 1993-1 C.B. 233 (Delaware); Rev. Rul. 93-53, 1993-26 I.R.B. 7 (Florida); Rev. Rul. 93-49, 1993-25 I.R.B. 11 (Illinois); Rev. Rul. 94-5, 1994-2 I.R.B. 21 (Louisiana); Rev. Rul. 93-30, 1993-1 C.B. 231 (Nevada); Rev. Rul. 93-92, 1993-42 I.R.B. 11 (Oklahoma); Rev. Rul. 93-81, 1993-38 I.R.B. 5 (Rhode Island); Rev. Rul. 93-5, 1993-1 C.B. 227 (Virginia); Rev. Rul. 93-50, 1993-25 I.R.B. 13 (West Virginia).

21. The IRS issued an as yet unreleased Private Letter Ruling in March 1994 confirming that an LLC to be formed under the Act would be classified as a partnership. In 1993, Theodore J. Esping of the Indianapolis law firm of Baker & Daniels requested a revenue ruling addressing the classification of LLCs formed under the Act.

“bullet-proof” LLC statutes, the Act, along with other more recent statutes such as Delaware’s, is considered a “flexible” statute. This means that the LLC’s organizational documents can vary “default rules” contained in the Act that would otherwise preclude the corporate characteristics from being present. This flexibility has two applications. First, it allows the organizer of an LLC to choose which, if any, of the three corporate characteristics will be present. For example, in one context it may be important for the entity to avoid dissolution upon the death or withdrawal of a specified member. In such a case, the operating agreement could be drafted in such a way that the LLC would not be dissolved upon such an event. Even though the LLC may then have the corporate characteristic of continuity of life, as long as it does not have either of the other two corporate characteristics, it could still be classified as a partnership. Second, the organizer can use the Act’s flexibility to take advantage of less restrictive interpretations of the corporate characteristics that the IRS has employed in a number of recent Private Letter Rulings. Before turning to the Act itself, a brief summary of the IRS’s position on how the classification analysis applies to LLCs is in order.

B. Continuity of Life

An unincorporated organization lacks the corporate characteristic of continuity of life if it is dissolved upon death, withdraw, retirement, or other termination of ownership status, unless *all* of the remaining owners consent to continue the business.²² Revenue Ruling 88-76 found that the Wyoming statute, which required the unanimous consent of the remaining members to continue business upon the occurrence of certain events affecting the status of any member, precluded the corporate characteristic of continuity of life. The Act contains a similar unanimous consent requirement to continue business after an “event of dissociation,” but, because it is expressed as a default rule, it can be varied by agreement.²³ This flexibility is important because, even if the entity has relatively few owners, unanimity may be difficult to obtain. Private Letter Rulings suggest that the flexibility of the Act can be used to minimize the risk of an unwanted dissolution in a number of ways short of the traditional requirement of unanimity. The default rule could be varied to: (a) lower the consent requirement from unanimity to the holders of a majority of the remaining interests;²⁴ (b) limit the types of events triggering the consent requirements; or (c) limit the consent requirement only to triggering events that affect certain members.

22. Treas. Reg. § 301.7701-2(b)(2) (1993).

23. IND. CODE ANN. § 23-18-9-1 (West 1994).

24. See, e.g., Priv. Ltr. Rul. 9325039 (March 26, 1993); Priv. Ltr. Rul. 9333032 (May 24, 1993).

LLCs formed under the Act may have a definite term or be perpetual until dissolved.²⁵ Earlier laws, such as Wyoming's, required a definite term.²⁶ Although it may appear reasonable to assume that an LLC with a stated term would be deemed lacking the corporate characteristic of continuity of life, that is not the case. The specification of a definite term for an LLC is simply not relevant to the issue of partnership classification.²⁷

C. Free Transferability of Interests

An unincorporated organization will have the corporate characteristic of free transferability of interests if an owner can, without the consent of other owners, transfer *all* attributes of ownership to another person.²⁸ The regulations provide that this characteristic does not exist if owners can only assign their right to share in the profits of an entity, and not their right to participate in the management of the entity.

An LLC formed under the Act that does not vary the Act's default rule should lack the corporate characteristic of free transferability of interests. The Act provides that an assignee of an interest in an LLC may become a member only if the other members unanimously consent.²⁹ As with the provision relating to dissolution upon dissociation of a member, this default rule can be varied by agreement. Based upon private letter rulings involving LLCs, there is reason to believe that the IRS will treat an LLC as lacking free transferability of interests if the members agree that an assignee may be admitted as a substitute member with the consent of a majority in interest of the remaining members.³⁰

D. Centralized Management

The final corporate characteristic—centralized management—has been more difficult for many LLCs to avoid. In Revenue Ruling 88-76, the Wyoming LLC was found to have this characteristic because three of its twenty-five members were designated as managers.³¹ An LLC formed under the Colorado statute, which requires appointment of a “manager,” was also found to have centralized management.³²

The regulations speak of centralized management as “a concentration of continuing exclusive authority to make management decisions.”³³ However, the

25. IND. CODE ANN. § 23-18-2-4(b)(3) (West 1994).

26. WYO. STAT. § 17-15-107 (Supp. 1993).

27. See RIBSTEIN & KEATINGE, *supra* note 4, at § 16.12.

28. Treas. Reg. § 301.7701-2(e) (1993).

29. IND. CODE ANN. § 23-18-6-4(a) (West 1994).

30. See Priv. Ltr. Rul. 9210019 (Dec. 6, 1991) (a Texas LLC prohibited transfers without consent of manager or if manager was not a member, a majority in interest of members).

31. Rev. Rul. 88-76, 1988-2 C.B. 360, 361.

32. Rev. Rul. 93-6, 1993-1 C.B. 229.

33. Treas. Reg. § 301.701-3(c)(3) (1993).

regulations also point out that the existence of a “mutual agency relationship” among owners, that is, each owner’s ability to bind all partners while acting within the scope of the entity’s business, would preclude the corporate characteristic of centralized management.³⁴ The existence of such a mutual agency relationship should also preclude centralized management even if the owners agree among themselves that management powers will be limited to only a specified few.³⁵

This distinction—the presence or absence of a mutual agency relationship among owners—forms the basis of the Act’s default rule on centralized management. The Act provides that each member is an agent of the LLC and can act to bind the entity unless the articles of organization provide for one or more managers.³⁶ The Act effectively creates two types of LLCs, “member-managed” and “manager-managed.” In general, a member-managed LLC should lack the corporate characteristic of centralized management even if the members have delegated some policy-making authority to one or more members (e.g., functioning as a “management committee”).³⁷ On the other hand, an LLC that appoints managers probably will have the corporate characteristic of centralized management, even if the members choose to elect themselves as managers.³⁸

E. Indiana Tax Treatment

It was the Indiana Department of Revenue’s position, prior to the adoption of the Act, that foreign LLCs that are classified as partnerships for federal income tax purposes would also be treated as a partnership for purposes of the Indiana gross income and adjusted gross income taxes.³⁹ As part of the legislation that included the Act, the definition of partnership for Indiana tax purposes was amended specifically to include LLCs treated as partnerships for federal tax purposes.⁴⁰

III. SOURCES OF THE ACT

A task force operating under the auspices of the Indiana Corporate Law Survey Commission largely was responsible for drafting the Act. The task force had several models available to it during 1992 when the Act was formulated. These included other state LLC statutes, notably Wyoming, Colorado, Maryland, and Delaware. The Act also draws upon several aspects of the “Prototype Limited Liability Company Act” prepared by a working group of the Subcommit-

34. Treas. Reg. § 301.7701-2(c)(4) (1993).

35. *See id.*

36. IND. CODE ANN. § 23-18-3-1 (West 1994).

37. *See* Priv. Ltr. Rul. 9321047 (Feb. 25, 1993).

38. *See supra* note 32.

39. Indiana Department of Revenue Policy Directive No. 2 (May 1992).

40. IND. CODE ANN. § 6-3-1-19(a) (West Supp. 1993).

tee on Limited Liability Companies of the American Bar Association's Section of Business Law.⁴¹

No single source can be cited as the sole basis for the Act because it departs from each of these sources in a number of respects. Many of the departures were intended to parallel provisions of Indiana statutes governing other entities, primarily the Indiana Business Corporation Law⁴² ("IBCL") and the Indiana Revised Uniform Limited Partnership Act⁴³ ("INRULPA"). Unlike the IBCL, however, the Act has no official comments that courts may consult to determine the underlying reasons, purposes and policies of the law. This lack of commentary may be addressed by the Indiana Corporate Law Survey Commission. It is also possible, as discussed below, that Indiana ultimately may adopt a uniform LLC act, which currently is in the process of development.

IV. SUBSTANTIVE PROVISIONS OF THE ACT

A. Definitions and General Provisions

The definitions used in the Act are drawn from the same sources used in drafting the Act itself. The first definition of note is that of a limited liability company. A "[l]imited liability company" or "domestic limited liability company" means an entity that is an unincorporated association organized under this article."⁴⁴ The Act defines the organizational documents of the entity, including the document that creates the LLC, the "articles of organization."⁴⁵ A "member," the owner of the LLC, is defined as a person, "admitted to membership . . . and as to whom an event of dissociation has not occurred."⁴⁶ A "majority in interest of the members" is defined as, "members who have made more than fifty percent (50%) of the agreed value, as stated in the records of the limited liability company, of the total contributions made by all members, to the extent that the contributions have not been previously returned."⁴⁷ This definition is significant in that a "majority in interest" is used throughout the Act as the threshold for approving many matters.

An LLC may be organized for "any lawful purpose," unless a more limited purpose is stated in the articles of organization.⁴⁸ An LLC has very broad powers, similar to those of a corporation that, for example, permit an LLC to sue

41. See RIBSTEIN & KEATINGE, *supra* note 14, for a reprint of the final draft Prototype Limited Liability Company Act dated Nov. 19, 1993.

42. IND. CODE ANN. §§ 23-1-17-1 to -54-3 (West 1989 & West Supp. 1993).

43. IND. CODE ANN. §§ 23-16-1-1 to -12-6 (West 1994).

44. *Id.* § 23-18-1-11.

45. *Id.* § 23-18-1-3.

46. *Id.* § 23-18-1-15.

47. *Id.* § 23-18-1-13.

48. *Id.* § 23-18-2-1.

or be sued, complain and defend in its own name.⁴⁹ In addition, LLCs may own and convey property, make contracts and guarantees, and render professional services, to the extent permitted by a profession's licensing authority.⁵⁰ The powers and purposes provisions of the Act are very similar to those of the IBCL.⁵¹ An LLC that operates a business subject to regulation under any statute (e.g., insurance) must also comply with such laws.⁵² This requirement is identical to the IBCL.⁵³

B. Formation and Articles of Organization

One or more persons can form an LLC by filing articles of organization with the Indiana Secretary of State.⁵⁴ Because the Act does not require that an LLC have two or more members, it raises the question of whether a one-member LLC can be treated as a partnership for tax purposes. According to commentators, even though such an entity may not be classified as a partnership for tax purposes, it may not automatically be precluded from treatment as a pass-through entity similar to a sole proprietorship that conducts business through an agent.⁵⁵ The classification issue ultimately may depend upon the absence of the corporate characteristics discussed above.

The organizer need not be a member of the LLC and serves a role similar to an incorporator of a corporation. Only minimal information need be disclosed in the articles of organization—even less information than would be required in a certificate of limited partnership or articles of incorporation of a business corporation.⁵⁶ Articles of organization function as a “notice” filing to the public and are required to contain only: (a) the name of the LLC; (b) the street addresses of its registered agent and registered office; (c) the date, if any, the LLC is to dissolve or a statement that the duration of the LLC is perpetual; and (d) if the LLC has managers, a statement to that effect.⁵⁷ The articles of organization may also include, “any other matters, not inconsistent with this article that the members agree to include, including any matters that are required to be or may be included in an operating agreement.”⁵⁸

49. *Id.*

50. *Id.* § 23-18-2-2.

51. *See* IND. CODE ANN. §§ 23-1-22-1; -2 (West 1989 & Supp. 1993).

52. IND. CODE ANN. § 23-18-2-1(b) (West 1994).

53. IND. CODE ANN. § 23-1-22-1(b) (West 1989).

54. IND. CODE ANN. § 23-18-2-4(a) (West 1994). *Compare* IND. CODE ANN. § 23-4-1-6(1) (West 1989) which defines a partnership as being formed by two or more persons.

55. *See* RIBSTEIN & KEATINGE, *supra* note 14, at § 16.19.

56. *Compare* IND. CODE ANN. § 23-18-2-4 (West 1994) with *id.* § 23-16-3-2; and IND. CODE ANN. § 23-1-21-2 (West 1989).

57. IND. CODE ANN. § 23-18-2-4(b) (West 1994).

58. *Id.*

The name of the LLC must include the words "limited liability company" or the abbreviations "L.L.C." or "LLC."⁵⁹ The name of an LLC must be distinguishable from the names of other LLCs on file with the Secretary of State.⁶⁰ Under the current policy of the Secretary of State's office, LLC names are not cross-checked against the names of corporations or limited partnerships. This practice is consistent with the policy adopted when INRULPA was enacted in 1988 of not cross-checking corporation and limited partnership names.⁶¹ LLCs may do business under an assumed name. The filing requirements for assumed names are similar to those for corporations and limited partnerships.⁶² Articles of organization may be amended only by the members of the LLC.⁶³ In addition, the Act permits limited liability companies to restate their articles of organization entirely.⁶⁴

C. Operating Agreement

Members of the LLC may enter into an "operating agreement," which functions much like the partnership agreement of a general or limited partnership.⁶⁵ The Act does not require an operating agreement, nor must it be in writing. However, a written operating agreement is necessary if the members of an LLC wish to vary the Act's default rules. An operating agreement need not be filed with the Secretary of State and, in general, is not a public record. It is the document that generally would determine matters such as contributions of the members; the manner in which members share in the distributions of assets, profits, and losses of the LLC; restrictions on transfer of members' interests; management rights; events requiring dissolution and other matters. The operating agreement will generally determine whether an LLC will have the corporate characteristics of continuity of life and free transferability of interests for partnership classification purposes.

The Act provides that unless otherwise stated in the written operating agreement, "[a] member or manager is not liable for damages to the limited liability company or to the members of the limited liability company for any action taken or failure to act on behalf of the limited liability company, unless the act or omission constitutes willful misconduct or recklessness."⁶⁶ The operating agreement may "[e]liminate or limit the personal liability of a member or manager for monetary damages for breach of a duty" provided for in the

59. *Id.* § 23-18-2-4(a).

60. *Id.* § 23-18-2-8.

61. *Id.* § 23-15-1-1(a)(6); (7).

62. *Id.* § 23-15-1-1.

63. *Id.* § 23-18-2-5.

64. *Id.* § 23-18-2-6.

65. *Id.* § 23-18-4-5.

66. *Id.* § 23-18-4-2(a). This is comparable to the standard applicable to directors of a corporation formed under the IBCL. IND. CODE ANN. § 23-1-35-1(e) (West 1993).

operating agreement or the Act.⁶⁷ In addition, a written operating . . . agreement may provide “[i]ndemnification of a member or manager for judgments, settlements, penalties, fines, or expenses incurred in a proceeding to which a person is a party because the person is or was a member or manager.”⁶⁸

The initial operating agreement must be adopted or agreed to by all persons who are members of the LLC at the time the initial agreement is agreed to or adopted.⁶⁹ The Act does not specifically require members of an LLC having a written operating agreement to sign that agreement. As a practical matter, it is advisable to have all members sign a written operating agreement at the time the agreement is adopted. If, for example, the operating agreement is amended later to add new members, all members should sign the amended agreement. An amendment to a written operating agreement must be in writing and, unless otherwise provided in the operating agreement, be approved by the unanimous consent of all members.⁷⁰ The Act requires that a copy of any written amendment to the operating agreement be delivered to each member who did not agree to the amendment and each assignee of a member’s interest who has not been admitted as a member.⁷¹

“A court may enforce an operating agreement by injunction or by granting other relief that the court in its discretion determines to be fair and appropriate in the circumstances.”⁷² In addition, a court has the power to order the dissolution of an LLC as an alternative to injunctive or other equitable relief if it is not “[r]easonably practicable to carry on the business in conformity with the articles of organization or operating agreement.”⁷³

D. Member-Managed and Manager-Managed LLCs

As previously discussed, the Act is flexible in the sense that it allows members to choose how the LLC is governed. If the management duties are placed with one or more managers, a statement to that effect must be included in the articles of organization.⁷⁴ Unless such a statement is contained in the articles of organization, the LLC will be managed by its members.⁷⁵

In a member-managed LLC, each member is an agent for the purpose of the LLC’s business or affairs.⁷⁶ As a result, the act of any member, including those appearing to third parties as carrying on the business or affairs of the LLC in the

67. IND. CODE ANN. § 23-18-4-4(1) (West 1994).

68. *Id.* § 23-18-4-4(2).

69. *Id.* § 23-18-4-6(a).

70. *Id.* § 23-18-4-6(c).

71. *Id.* § 23-18-4-6(d).

72. *Id.* § 23-18-4-7(a).

73. *Id.* § 23-18-9-2.

74. *Id.* § 23-18-4-1(a).

75. *Id.*

76. *Id.* § 23-18-3-1(a).

usual course, binds the LLC, unless the member does not have the authority to act on behalf of the LLC in that manner and the person with whom the member is dealing has knowledge of the member's lack of authority.⁷⁷

In a manager-managed LLC, a member acting solely in the capacity as a member is not an agent of the limited liability company.⁷⁸ Each manager is an agent of the LLC for the purpose of its business or affairs and the act of any manager would bind the LLC, unless the manager is acting outside the scope of his other authority and the person with whom the manager is dealing has knowledge of that fact.⁷⁹ The Act provides that the manager's agency authority may be limited or otherwise modified by stating the limitation or modification in the articles of organization.⁸⁰ In general, an act of a manager or member that is not apparently for carrying on the business of the LLC in the usual way does not bind the LLC, unless it is authorized in accordance with a written operating agreement or by the unanimous consent of all members.⁸¹

The Act addresses what constitutes notice to the LLC by providing that, in general, in a member-managed LLC, notice to any member of a matter relating to the business or affairs of the LLC is notice to the entity.⁸² In a manager-managed LLC, notice to a manager of a matter relating to the business or affairs of the LLC would constitute notice to the LLC, except in the case of a fraud on the LLC committed by or with the consent of that manager.⁸³ Notice to or knowledge of any member of a manager-managed LLC while the member is acting solely in the capacity of a member is not considered notice to the LLC.⁸⁴

Regardless of how the LLC is managed,

[a] member, a manager, an agent, or an employee of a limited liability company is not personally liable for the debts, obligations, or liabilities of the limited liability company, whether arising in contract, tort, or otherwise, or for the acts or omissions of any other member, manager, agent, or employee of the limited liability company.⁸⁵

77. *Id.*

78. *Id.* § 23-18-3-1(b).

79. *Id.*

80. *Id.* It remains to be determined whether such a limitation on a manager's authority would preclude a third party from relying on a manager's apparent authority. See RIBSTEIN & KEATINGE, *supra* note 14, at § 8.08.

81. IND. CODE ANN. § 23-18-3-1(c) (West 1994).

82. *Id.* § 23-18-3-2(a).

83. *Id.* § 23-18-3-2(b).

84. *Id.*

85. *Id.* § 23-18-3-3(a).

Those persons may, however, be held personally liable for their own acts or omissions.⁸⁶ This limit on liability is comparable to that of shareholders, directors, agents, or employees of a corporation.⁸⁷ The Act also provides:

[The Act] [a]nd Indiana law exclusively govern any conflict between Indiana law and the laws of another state with regard to the liability of a member, a manager, an agent, or an employee of a limited liability company organized and existing under this article for the debts, obligations, or liabilities of the limited liability company, or for the acts or omissions of other members, managers, agents, or employees of the limited liability company.⁸⁸

The Act permits the inclusion of penalties in a written operating agreement for a manager who does not perform or comply with the terms and conditions of the operating agreement.⁸⁹ A manager may resign according to provisions specified in an operating agreement.⁹⁰ A written operating agreement may provide that a manager does not have the right to resign. Notwithstanding such a provision, a manager may resign at any time by giving written notice to the members and other managers.⁹¹ However, if a manager's resignation violates the operating agreement, the LLC may recover damages for breach of the operating agreement and offset the damages against any amount payable to the resigning manager. These remedies are in addition to any remedies otherwise available under applicable law.⁹²

E. Rights and Duties of Members and Managers

As previously discussed, unless the articles of organization provide for managers, it is deemed managed by its members. In this situation, "members have the right and authority to manage the affairs and make all of the decisions of the limited liability company," unless the operating agreement or the Act provides otherwise.⁹³ If the articles of organization provide for managers, then, except to the extent such authority is reserved in the operating agreement, the managers have the authority to manage the business or affairs of the LLC.⁹⁴ According to the Act, managers must be selected, elected, removed, or replaced by a vote, consent, or approval of a majority in interest of the members.⁹⁵ The

86. *Id.*

87. *See* IND. CODE ANN. § 23-1-26-3 (West 1989).

88. IND. CODE ANN. § 23-18-3-3(b) (West 1994).

89. *Id.* § 23-18-4-9.

90. *Id.* § 23-18-4-11(a).

91. *Id.*

92. *Id.*

93. *Id.* § 23-18-4-1(a).

94. *Id.* § 23-18-4-1(b).

95. *Id.* § 23-18-4-1(b)(1); *see also id.* § 23-18-1-13 (defining "majority in interest of the

Act provides that managers of the LLC need not be members or natural persons.⁹⁶ Managers continue to serve until their successors have been elected and qualified much in the same manner as directors of a corporation are elected and qualified.⁹⁷ As with other provisions of the Act, the rights and duties of members and managers can be varied by agreement.

Voting rights of members or managers may be limited or enhanced in the operating agreement. In general, unless the operating agreement or the Act otherwise requires a different vote, "the affirmative vote, approval, or consent of a majority in interest of the members is required to decide a matter connected with the business or affairs of the limited liability company."⁹⁸

Much in the manner that shareholders and officers of corporations are permitted to rely in good faith upon the records of corporations and on the information, opinions, reports, and statements presented to it by others, members or managers of an LLC are not liable when relying on similar records, reports, or information.⁹⁹ The member or manager must reasonably believe such matters are within the other person's professional or expert competence and the person must have been selected with reasonable care by or on behalf of the LLC.¹⁰⁰

F. Financing and Membership

A member may contribute cash or property, or may make an enforceable promise to perform services to an LLC.¹⁰¹ A promise by a member to make a contribution is not enforceable unless the promise is in writing and signed by the member.¹⁰² A member will be required "to perform any enforceable promise to contribute cash or property or to perform services, even if the member is unable to perform for any reason, including death or disability," unless otherwise provided in a written operating agreement.¹⁰³ If a member has pledged to contribute property or services and does not make the required contribution, the member may be required to contribute cash equal to the value of the contribution that has not been made.¹⁰⁴ The operating agreement also

members").

96. *Id.* § 23-18-4-1(b)(2).

97. *Id.* § 12-18-4-1(b)(3).

98. *Id.* § 23-18-4-3(a).

99. *Id.* § 23-18-4-10. *See also* IND. CODE ANN. § 23-1-35-1(b) (West Supp. 1993) (containing comparable IBCL provisions).

100. *Id.*

101. IND. CODE ANN. § 23-18-5-1 (West 1994). Although the IBCL permits shares to be issued for a similarly broad range of consideration, the provisions are not identical. IND. CODE ANN. § 23-1-26-2(b) (West 1989). A corporation that issues shares for promissory notes or promises of future services must also notify its shareholders of the fact. *Id.* § 23-1-53-2(b).

102. IND. CODE ANN. § 23-18-5-1(a) (West 1994).

103. *Id.* § 23-18-5-1(b).

104. *Id.* § 23-18-5-1(c).

may provide that a member who fails to make a capital contribution or other payment that the member is required to make will be subject to remedies specified in the operating agreement or must suffer specific consequences.¹⁰⁵ The remedy or consequence imposed on the defaulting member may include the following: reducing the member's interest in the LLC; subordinating the member's interest in the LLC to that of the nondefaulting members; a forced sale of the member's interest in the LLC; forfeiture of the member's interest in the LLC; a loan by the nondefaulting members in the amount necessary to meet the commitment; and a determination of the value of the member's interest in the LLC and subsequent sale of the member's interest in the LLC at that value.¹⁰⁶ The LLC may compromise the obligation of a member to make a capital contribution or to return distributions made in violation of the Act only if the action complies with a written operating agreement or, if the written operating agreement does not contain such provisions, with the unanimous consent of all members.¹⁰⁷ Such a compromise would not affect the rights of a creditor who extended credit before the compromise in reliance on a writing signed by the member that reflects the obligation.¹⁰⁸

The Act's default rules address the allocation of profits and losses and distribution of cash and other assets. It provides:

Unless otherwise provided in the operating agreement, profits and losses must be allocated on the basis of the agreed value, as stated in the records of the limited liability company, of the contributions made by each member to the extent the contributions have been received by the limited liability company and not previously returned.¹⁰⁹

Distribution of cash and other assets, with the exception of distributions to a dissociating member and distributions upon the dissolution of the LLC, must be shared among the members and among the classes of members, if any, in the manner provided in the operating agreement.¹¹⁰

If a member dissociates from the LLC and it does not cause dissolution, that member is entitled to receive a distribution pursuant to the Act or the operating agreement.¹¹¹ Unless otherwise provided in the operating agreement, the dissociating member is entitled to receive the fair value of the member's interest in the LLC as of the date of dissociation based upon the member's right to share in the distributions from the LLC.¹¹²

105. *Id.* § 23-18-5-2(c).

106. *Id.* § 23-18-5-2(c).

107. *Id.* § 23-18-5-2(a).

108. *Id.* § 23-18-5-2(b).

109. *Id.* § 23-18-5-3.

110. *Id.* § 23-18-5-4.

111. *Id.* § 23-18-5-5.

112. *Id.*

The Act limits distributions in a similar manner as the IBCL limits corporate distributions.¹¹³ In general, a distribution may not be made if the LLC “[w]ould not be able to pay its debts as they become due in the usual course of business” or its assets would be less than the sum of its total liabilities plus, the amount that would be needed to satisfy any preferential rights superior to members’ rights to distributions if the LLC’s affairs were wound up at the time of the distribution.¹¹⁴ In addition, members or managers approving a distribution in violation of the operating agreement or the statutory limit are personally liable to the LLC for the amount of the distribution exceeding the amount that could have been distributed without violation.¹¹⁵ If a member or manager is held liable for an unlawful distribution, the member or manager is entitled to contribution from each other member or manager who could be held liable for the unlawful distribution and from each member for the amount the member received knowing that the distribution exceeded the limits of the operating agreement or the Act.¹¹⁶

A member does not have the right to demand and receive a distribution from an LLC in a form other than cash, unless the operating agreement provides otherwise.¹¹⁷ In addition, “[a] member may not be compelled to accept a distribution in kind from a limited liability company to the extent that the member’s percentage interest in the assets being distributed in kind exceeds the percentage of distributions that the member is entitled to receive under section 4 of this chapter.”¹¹⁸ At the time a member becomes entitled to receive a distribution, the member has the status of, and is entitled to, all remedies available to a creditor of the LLC regarding the distribution.¹¹⁹

“The interest of a member in a limited liability company is personal property.”¹²⁰ A person may become a member of the LLC upon compliance with the terms of the operating agreement, or if the operating agreement is not in writing, upon the written consent of all members.¹²¹ If a new member is an assignee of an interest, the assignee may become a member only if the other members unanimously consent, unless otherwise provided in the operating agreement.¹²² As discussed above in Part III.C., the question of how assignees may be admitted as new members is relevant to determining whether an LLC has

113. *Id.* § 23-18-5-6(a). *See also* IND. CODE ANN. § 23-1-28-3 (West 1989) (containing comparable IBCL provision).

114. Unless the operating agreement permits otherwise. IND. CODE ANN. § 23-18-5-6(a) (West 1994).

115. *Id.* § 23-18-5-7(a).

116. *Id.* § 23-18-5-7(b).

117. *Id.* § 23-18-5-8.

118. *Id.* § 23-18-5-8(b).

119. *Id.* § 23-18-5-9.

120. *Id.* § 23-18-6-2.

121. *Id.* § 23-18-6-1(a).

122. *Id.* §§ 23-18-6-1; -4.

the corporate characteristic of free transferability of interests. Any limitations or restrictions on the transferability of interests must be included in the operating agreement. If they are not, the default rules of the Act would apply.

An interest in an LLC is assignable in whole or in part and assignment will not, in and of itself, dissolve the LLC or entitle the assignee to participate in the management and affairs of the LLC or to become or exercise any rights of a member.¹²³ The assignment must be coupled with the unanimous vote in writing of all other members of the LLC in order to transfer the economic and management rights (or voting rights) of the assignor.¹²⁴

The Act contains a list of events that terminate a person's status as a member. These include withdrawal from the LLC; assignment of a member's entire interest in the LLC; removal or death of a member; and, if a member is a business entity, its dissolution.¹²⁵ In addition, a written operating agreement may vary the events causing termination of membership and provide for other events resulting in a person ceasing to be a member, including insolvency, bankruptcy, and adjudicated incompetency.¹²⁶

The Act provides for voluntary withdrawal of a member by giving thirty days written notice to the other members or other notice required under the operating agreement, unless the written operating agreement restricts the power of the member to withdraw voluntarily from the LLC.¹²⁷ If a member's withdrawal results in a violation of the operating agreement or the withdrawal is the result of wrongful conduct of the member, the LLC may recover damages for breach of the operating agreement. These damages include the reasonable cost of obtaining the replacement of services that the withdrawing member was obligated to perform.¹²⁸ The LLC may offset the damages against amounts otherwise distributable to the member in addition to pursuing any remedies provided for in the operating agreement or applicable law.¹²⁹ If the LLC has been established for a definite term or a particular undertaking, withdrawal by a member before the expiration of the term or the completion of the undertaking is considered a breach of the operating agreement, unless otherwise provided in a written operating agreement.¹³⁰

G. Professional Limited Liability Companies

The Act does not specifically permit professionals to practice in the form of an LLC. Rather, the Act permits professionals to practice as LLCs to the extent

123. *Id.* § 23-18-6-3.

124. *Id.* § 23-18-6-4.

125. *Id.* § 23-18-6-5.

126. *Id.* § 23-18-6-5(b).

127. *Id.* § 23-18-6-6(a).

128. *Id.*

129. *Id.*

130. *Id.* § 23-18-6-6.

the applicable licensing authority permits such practice. The Act provides:

Except for the prohibitions in this article concerning the personal liability of members, managers, employees, and agents of a limited liability company organized under this article, nothing in this article is intended to restrict or limit in any manner the authority and duty of any licensing authority (as defined in IC 23-1.5-1-9) or to regulate the provision of professional services (as defined in IC 23-1.5-1-11) within Indiana, notwithstanding that the member, manager, or employee of a limited liability company is providing professional services or engaging in the practice of a profession through the limited liability company.¹³¹

Effective January 1, 1994, certified public accountants may be organized as LLCs.¹³² In addition, the Indiana Health Professions Bureau is in the process of surveying the various boards that regulate health professionals in the State of Indiana. The Medical Licensing Board, the Board of Pharmacy, the State Psychology Board, the State Board of Dental Examiners, and the Board of Chiropractic Examiners have determined that physicians, pharmacists, psychologists, dentists, and chiropractors may be organized as limited liability companies without changes to the statutes or regulations governing those professions.¹³³ It is expected that other professions may seek statutory or regulatory authorization to practice as LLCs.

The use of an LLC does not insulate a professional from liability for his or her own conduct. The Act specifically provides that it does not "[a]lter any law applicable to the relationship between a person rendering professional services and a person receiving professional services, including liability arising out of the professional services."¹³⁴ In addition, the Act provides: "A person rendering professional services as a member, a manager, an employee, or an agent of a limited liability company is personally liable for the consequences of the person's acts or omissions to the extent provided by Indiana law or the laws of another state where the person is considered responsible."¹³⁵ However, the LLC form would offer protection against the vicarious liability that a partner would have otherwise, merely by reason of his status as an owner. For example, an owner of a certified public accounting firm organized as an LLC would not be personally liable for the professional liability of another owner merely because he or she is a member of the LLC.¹³⁶ The provisions regarding professionals

131. *Id.* § 23-18-2-3.

132. IND. CODE ANN. §§ 25-2.1-1-7 (West Supp. 1993).

133. The Indiana Health Professions Bureau has communicated the decision of the various boards regulating health professions to permit the use of the LLC form through memoranda sent to the Indiana Secretary of State.

134. IND. CODE ANN. § 23-18-3-4(a) (West 1994).

135. *Id.* § 23-18-3-4(b).

136. *See id.* § 23-18-3-3(a). In the case of attorneys, only individual professionals, not "firms," are currently licensed to practice. The Indiana Rules of Professional Conduct do not

using the LLC form are far from uniform throughout the United States. Many LLC statutes do not permit LLCs to be used by professionals or the laws regulating such professions do not expressly permit the use of LLCs.

H. Dissolution

An LLC may be dissolved voluntarily “[a]t the time or on the occurrence of the events specified in writing in the articles of organization or operating agreement.”¹³⁷ In addition, an LLC may be dissolved by the written consent of all members.¹³⁸ Also, an LLC is dissolved when an event of dissociation occurs regarding a member, unless the business of the LLC is continued by the consent of all the remaining members within 90 days, or as otherwise provided in the articles of organization or a written operating agreement.¹³⁹ Finally, an LLC may be dissolved by the entry of a decree of judicial dissolution.¹⁴⁰ As noted previously, the criteria for an “event of dissociation” may be modified by the terms of the articles of organization or by a written operating agreement. Again, this is relevant to determining whether the LLC will have the corporate characteristic of continuity of life.

An LLC may file articles of dissolution with the secretary of state after it dissolves. The articles of dissolution must contain the LLC’s name, the date on which its articles of organization were filed, its principal office address, the date on which the dissolution occurred, and other information the members or managers deem appropriate.¹⁴¹ The distribution of assets and disposition of claims of a dissolved LLC closely parallel similar provisions regarding dissolved corporations in the IBCL.¹⁴² Also similar to the IBCL, a dissolved LLC may publish notice of its dissolution and request that persons with claims against the company present them pursuant to the notice.¹⁴³

The secretary of state may dissolve an LLC administratively if: it fails to deliver an annual report within sixty days after the report is due; it is without a registered agent or office in Indiana for at least sixty days; it does not notify the secretary of state within sixty days after its registered agent or office has

currently recognize LLCs in its provisions regarding law firms and other associations. However, even if an Indiana law firm could operate as an LLC, its members may not benefit from the limited liability provisions of the Act if LLCs are treated the same as professional corporations. Rule 27(c) of the Indiana Rules of Admission to the Bar and Discipline of Attorneys states that the use of a professional corporation “[s]hall not modify the . . . liability of each for all . . . as existed in a partnership for the practice of law.”

137. IND. CODE ANN. § 23-18-9-1 (West 1994).

138. *Id.*

139. *Id.*

140. *Id.*

141. *Id.* § 23-18-9-7.

142. *Id.* §§ 23-18-9-6, -8; *see also* IND. CODE ANN. § 23-1-45-6 (West 1989).

143. IND. CODE ANN. § 23-18-9-9 (West 1994); *see also* IND. CODE ANN. § 23-1-45-7 (West Supp. 1993).

changed, its registered agent has resigned, its registered office has been discontinued; or the period of duration stated in the LLC's articles of organization expires.¹⁴⁴ The procedures for administrative dissolution, including those permitting reinstatement and the appeal of denial of reinstatement, are based upon the IBCL.¹⁴⁵

I. Foreign Limited Liability Companies

At the time of adoption of the Act, the INRULPA provisions permitting foreign LLCs to transact business in Indiana were repealed and a chapter was included in the Act to permit foreign LLCs to transact business in Indiana.¹⁴⁶ This chapter is similar to comparable provisions of the IBCL and INRULPA.¹⁴⁷ For example, the Act defines what activities do not constitute transacting business in Indiana by a foreign LLC.¹⁴⁸ The list at this subsection is identical to the list found in the IBCL and INRULPA.¹⁴⁹ Other provisions follow the IBCL or the INRULPA regarding the change of registered office or agent, service of process, certificate of withdraw of a foreign limited liability company, grounds for revoking a certificate of authority of a limited liability company, and so forth. A few jurisdictions that have adopted LLC acts do not permit foreign limited liability companies to be registered in their states. In addition, several foreign LLC acts only allow the admission of foreign LLCs and do not authorize the creation of limited liability companies in that jurisdiction.

J. Miscellaneous Provisions

1. Merger.—Unlike some other LLC acts, the Act does not permit other types of business entities to merge into LLCs.¹⁵⁰ Only an LLC may merge into another LLC.¹⁵¹ The provisions of the Act permitting mergers of limited liability companies were based largely upon the IBCL.¹⁵² A plan of merger must be in writing and must be approved by the unanimous consent of the members, unless the operating agreement provides otherwise.¹⁵³ After a plan of merger has been approved by an LLC, the surviving LLC is required to file

144. IND. CODE ANN. § 23-18-10-1 (West 1994).

145. Compare *Id.* §§ 23-18-10-1 to -5 and IND. CODE ANN. §§ 23-1-46-1 to -4 (West 1989 & Supp. 1993).

146. IND. CODE ANN. §§ 23-18-11-1 to -18 (West 1994).

147. See IND. CODE ANN. §§ 23-1-49-1 to -10 (West 1989); IND. CODE ANN. §§ 23-16-10-1 to -9 (West 1994).

148. IND. CODE ANN. § 23-18-11-2 (West 1994).

149. IND. CODE ANN. §§ 23-1-49-1 to -10 (West 1989); IND. CODE ANN. § 23-16-10 (West 1994).

150. See, e.g., ARIZ. REV. STAT. ANN. § 29-751 (1992); DEL. CODE tit. 18, § 209 (1992).

151. IND. CODE ANN. § 23-18-7-1 (West 1994).

152. See IND. CODE ANN. §§ 23-1-40-1 to -7 (West 1989).

153. IND. CODE ANN. §§ 23-18-7-2, -3 (West 1993).

articles of merger with the secretary of state.¹⁵⁴ It is necessary to include a copy of the plan of merger with this filing.¹⁵⁵

2. *Suits By and Against Limited Liability Companies.*—A suit may be brought in the name of an LLC by a member, regardless of whether the articles of organization provide for a manager or managers.¹⁵⁶ A member is authorized to file suit by an affirmative vote of a majority in interest of the members, unless the Act requires the vote of all members.¹⁵⁷ The Act provides that a member interested in the outcome of a suit that is adverse to the interest of the LLC may not vote on whether to file suit.¹⁵⁸ If the LLC is managed by a manager or managers, a manager who is authorized to do so by the articles of organization, the operating agreement, or a vote of a majority of the managers may file suit.¹⁵⁹ The vote of a manager who has an interest in the outcome of the suit that is adverse to the interest of the LLC must be excluded.¹⁶⁰ A member may not be made a party to a proceeding by or against an LLC solely because he or she is a member of the LLC, except when the proceeding is brought to enforce a member's right against or a liability to an LLC or in an action brought on behalf of the LLC under section 23-18-8-1 of the Act.¹⁶¹

3. *Administrative Provisions.*—The administrative provisions of the Act closely parallel the IBCL and INRULPA.¹⁶² For example, the requirements for document execution and filing with the secretary of state are identical to those acts.¹⁶³ The fee schedule for limited liability companies is the same as for corporations or limited partnerships.¹⁶⁴ Annual reports are required of domestic and foreign LLCs and the secretary of state may prescribe and furnish those forms.¹⁶⁵ In addition, the secretary of state may prescribe and furnish a form for a foreign LLC's application for a certificate of authority to transact business in Indiana or a form for a certificate to withdraw.¹⁶⁶ At the present time, the secretary of state's office has decided not to create forms for LLCs. This is consistent with that office's policy not to provide limited partnership forms when INRULPA was adopted in 1988.

154. *Id.* § 23-18-7-4.

155. *Id.* § 23-18-7-4(a)(2).

156. *Id.* § 23-18-8-1.

157. *Id.*

158. *Id.*

159. *Id.*

160. *Id.*

161. *Id.* § 23-18-3-5.

162. *See id.* §§ 23-16-12-1 to -6; 23-18-12-1 to -11; IND. CODE ANN. §§ 23-1-18-1 to -10 (West 1989).

163. *See* IND. CODE ANN. § 23-18-12-1 (West 1994).

164. *See id.* § 23-18-12-3.

165. *Id.* § 23-18-12-2.

166. *Id.*

The Act permits documents to be filed with a delayed effective date of up to ninety days after the date the document is filed.¹⁶⁷ A certificate of correction may be filed to remedy incorrect statements or a document that was defectively executed.¹⁶⁸ The secretary of state will issue a certificate of existence for domestic LLCs and a certificate of authority for foreign LLCs.¹⁶⁹ Finally, the Act contains a unique provision, which states that "All provisions of the Constitution of the United States, the Constitution of the State of Indiana, and IC 1-1 apply to this article."¹⁷⁰ This was added in response to some concern that the reservation of powers clause would not apply to this Act and there has been some confusion, particularly at the trial court level, about savings clause issues relating to business entities.

V. CONCLUSION

The Act represents a continuation of Indiana's efforts to modernize its laws governing business associations. Following the major changes effected by the adoption of the IBCL in 1985, INRULPA in 1988, and the Indiana Nonprofit Corporation Act of 1991, the Act permits Indiana businesses another alternative in choosing an appropriate structure.

The LLC is likely to prove to be an attractive alternative to other traditional forms, particularly in instances in which a "pass-through" entity is desirable for tax purposes. This would include many situations in which a partnership, limited partnership, or S corporation otherwise would be used.

There will be many situations in which an LLC will not be the best alternative. Not all states authorize LLCs and there currently are significant differences among the state laws. These factors limit the usefulness of the LLC form to businesses that must operate on a multi-state basis. The number of owners that an LLC may have and still qualify as a partnership for tax purposes will also limit its appeal. Federal income tax restrictions would deny pass-through tax treatment to an LLC that has "publicly-traded" securities.¹⁷¹ S corporations will continue to have appeal in several situations, in particular, when an entity has only one owner. There will probably be some transactional cost advantages to using an S corporation because less time and expense typically would be involved in drafting organizational documents for an S corporation. Drafting the documents for an LLC, like drafting partnership documents, may take longer than corporate documents because so many key issues such as capital contributions, allocations of profits and losses, and managerial structure are determined by agreement of the parties for an LLC or partnership, rather than by

167. *Id.* § 23-18-12-4.

168. *Id.* § 23-18-12-5.

169. *Id.* § 23-18-12-9.

170. *Id.* § 23-18-13-1.

171. I.R.C. § 7704 (1993).

reference to the statute. Thus, the flexibility available in the LLC structure comes at some cost.

Although the Act may represent the “latest word” in Indiana business associations, it does not represent the “last word.” Changes to the Act may be considered to incorporate features of other state’s LLC acts¹⁷² or to address shortcomings that will come to light in practice. Ultimately, it may make most sense for Indiana and other states with LLC statutes to adopt a uniform act, such as that being developed by the National Conference of Commissioners on Uniform State Laws,¹⁷³ to realize the full potential of this newest species of business association, the limited liability company.

172. One provision that is worthy of consideration is a statutory method for converting a partnership or limited partnership to an LLC. Both Virginia and West Virginia provide a mechanism that avoids the need to transfer assets from the converting entity to the LLC. *See* VA. CODE ANN. § 13.1-1010.0(B) (Michie 1992); W.VA. CODE § 31-1A-47(c) (1992).

173. A discussion draft of a Uniform Limited Liability Company Act was circulated in connection with the 1993 annual meeting of the National Conference of Commissioners on Uniform State Laws.

RECENT DEVELOPMENTS IN INDIANA CORPORATION LAW

RICHARD E. DEER*

INTRODUCTION

Although legislative changes in Indiana corporation law in 1993 were modest, Indiana courts were confronted with several issues of interest to the practitioner resulting in some refinements and clarifications of existing law. This Article first addresses the 1993 statutory developments in the Indiana corporation law and then reviews the judicial developments in Indiana corporate law.

I. STATUTORY DEVELOPMENTS

The General Assembly in 1993 made minimal changes to the Indiana Business Corporation Law¹ (BCL), principally making minor conforming changes to accommodate the organization of limited liability companies.² Substantively, the BCL was amended to clarify the business corporation's permissive authority to purchase or maintain insurance on behalf of its present or former directors, officers, employees or agents.³ Previously, the BCL was silent on whether a corporation could purchase insurance from an affiliate or from an affiliate that is not insuring other risks. Effective July 1, 1993, a corporation may purchase insurance from, or reinsure by "an insurer that is owned by or otherwise affiliated with the corporation whether the insurer does or does not do business with other persons."⁴ In light of the General Assembly's previous policy that insurance, even insurance that goes beyond the power to indemnify, is to be permitted,⁵ the present policy is probably nothing more

* Partner, Barnes & Thornburg. The author acknowledges the assistance of William J. Gigowski in the preparation of this article. The views expressed herein are solely those of the author.

1. IND. CODE ANN. §§ 23-1-1-1 to -54-3 (Burns 1989 & Supp. 1993).

2. IND. CODE ANN. §§ 23-1-20-30(2), 23-1-37-2, 23-1-37-5(2), 23-1-37-14 and 23-1-54-3 (Burns 1989 & Supp. 1993). This Article does not discuss the Indiana Business Flexibility Act which now permits the organization in Indiana of limited liability companies. See David C. Worrell & Marci A. Reddick, *The Indiana Business Flexibility Act (Limited Liability Companies)*, 27 IND. L. REV. 919 (1994). See also Pub. L. No. 8-1993, § 301, 1993 Ind. Acts, 1970-2023 (codified at IND. CODE ANN. §§ 23-18-1-1 to -13-1 (Burns Supp. 1993)).

3. IND. CODE ANN. § 23-1-37-14 (Burns Supp. 1993).

4. *Id.* (as amended by Pub. L. No. 8-1993, § 300, 1993 Ind. Acts 1970).

5. Prior to the 1993 amendment of Indiana Code § 23-1-37-14, an Indiana corporation could purchase and maintain insurance on behalf of an individual who is or was a director, officer, employee, or agent of the corporation . . . against liability asserted against or incurred by the individual in that capacity or arising from the individual's status . . . whether or not the corporation would have the power to indemnify the individual against the same liability under section 8 or 9 [IC 23-1-37-8 or IC 23-1-37-9] of this chapter.

The amendment merely permits a corporation to purchase insurance from, or reinsure a policy by, an insurer owned or affiliated with the corporation whether or not that affiliate or subsidiary does business with any other person. Whether a corporation insured directors, officers, employees, or

than a clarification of the corporation's existing authority. Although this statutory change does not appear to alter existing rights, the courts may not give the change retroactive effect.⁶

The Indiana Nonprofit Corporation Act of 1991⁷ (the NPC) received only modest attention in the last session of the 1993 General Assembly. The NPC generally provides that three classes of corporations may take advantage of the statute: a public benefit corporation; a mutual benefit corporation; and a religious corporation.⁸ The category of public benefit corporation was expanded to include veterans' organizations, including posts, units and auxiliaries of an organization that are federally chartered for patriotic, public or charitable purposes and are recognized as being tax exempt under sections 501(c)(4) or 501(c)(19) of the Internal Revenue Code of 1986.⁹ The 1993 General Assembly also amended the statutory provisions relating to organizational meetings when initial directors are not named in the articles of incorporation. The statute, as now amended, requires the incorporator or a majority, if there are more than one, to call an organizational meeting to either elect directors and complete the organization of the corporation or to elect a board to complete the organization.¹⁰ The General Assembly also enacted a caveat to the power of a nonprofit corporation to expel or suspend a member for nonpayment of dues and assessments. Now, power cannot be exercised to affect the validity of a "mandatory" membership or a lien "imposed by a recorded declaration of covenant or a similar commitment running with the real property or an interest in the real property."¹¹ The 1993 General Assembly also imposed the NPC annual report provision on "all nonprofit domestic and foreign corporations incorporated under this article or a previous statute."¹² Exempt from this new requirement are entities currently required to file annual reports with the Secretary of State.¹³ In addition, the month—not the calendar quarter—is now used to determine the due date of the annual reports. Also, the Secretary of State was given flexibility to accept annual reports two months before the due date.¹⁴ The 1993 General Assembly made other clerical changes to the NPC,

agents by purchasing a policy from a non-affiliated company or from an affiliate would seem to be a distinction without a substantial difference.

6. See *Brane v. Roth*, 590 N.E.2d 587, 590 (Ind. Ct. App. 1992) (noting that generally statutes are not given retroactive effect unless the legislature so provides and retroactive application is disfavored where shareholders' existing rights against directors are adversely affected).

7. IND. CODE §§ 23-17-1-1 to -30-4 (Supp. 1992).

8. IND. CODE § 23-17-3-2(2) (Supp. 1992).

9. IND. CODE ANN. § 23-17-2-23(1)(D) (Burns Supp. 1993).

10. IND. CODE ANN. § 23-17-3-7(a)(2) A-B (Burns Supp. 1993).

11. IND. CODE ANN. § 23-17-7-7(a)(2) (Burns Supp. 1993).

12. IND. CODE ANN. § 23-17-27-8(a) (Burns Supp. 1993) (effective September 1, 1993).

13. *Id.*

14. IND. CODE ANN. § 23-17-27-8(d) (Burns Supp. 1993).

including small conforming changes to accommodate the organization of limited liability companies.¹⁵

II. JUDICIAL DEVELOPMENTS

A. *Derivative Actions*

In 1993, the court of appeals considered the statutes of limitation for derivative actions in *INB National Bank v. Moran Electric Service, Inc.*¹⁶ and *Browning v. Walters*.¹⁷ In both cases, the court found that the applicable statute of limitation is determined by the substance of the derivative action.¹⁸ After looking at the substance of the derivative action, the *INB National Bank* court found that the applicable statute of limitation is extended by virtue of “only legal disability, including incompetence, minority, imprisonment, non-residency under certain circumstances, war, death in certain instances, and fraudulent concealment.”¹⁹ The plaintiffs in *INB National Bank* attempted to toll the statute of limitation based upon a “presidential domination”²⁰ theory that the statutory period should be tolled while the dominant president defendant controlled the corporation.²¹ The court of appeals discussed this assertion and stated that this “theory [for] tolling a statute of limitation has not been recognized in Indiana”²²

15. See IND. CODE ANN. §§ 23-17-1-4, 23-17-2-12(8), 23-17-15-3, 23-17-16-2, 23-17-16-5, 23-17-16-14, 23-17-17-4, 23-17-18-1, 23-17-19-3 and 23-17-20-1 (Burns Supp. 1993).

16. 608 N.E.2d 702 (Ind. Ct. App. 1993).

17. 616 N.E.2d 1040 (Ind. Ct. App. 1993), *reh'g granted in part*, 620 N.E.2d 28 (Ind. Ct. App. 1993).

18. 608 N.E.2d at 707, 616 N.E.2d at 1046. In *INB National Bank*, the court refused to apply the twenty-year statute to a contract evidenced by a corporate resolution, stating that the twenty-year statute of limitation period of Indiana Code Section 34-1-2-2(6) applies only to written, integrated contracts where proof problems are minimal. *Id.* (citing *Movement for Opportunity & Equality v. General Motors Corp.*, 622 F.2d 1235 (7th Cir. 1980)). The Court of Appeals applied the six-year statute of limitation from Indiana Code Section 34-1-2-1, characterizing the action as a general contract action relying on parol evidence, people's memories and extraneous documents. *Id.* (citing *International Union of United Auto, Aerospace & Agricultural Implement Workers of Am. (UAW), AFL-CIO v. Hoosier Cardinal Corp.*, 346 F.2d 242 (7th Cir. 1965), *aff'd*, 383 U.S. 696 (1966)).

19. 608 N.E.2d at 707 (citing *Walker v. Memering*, 471 N.E.2d 1202 (Ind. Ct. App. 1984)). The court of appeals noted that the circumstances under which a statute of limitation can be extended are defined by statute. *Id.* (citing IND. CODE §§ 34-1-2-5 to -9 (1988)).

20. *Id.*

21. Plaintiffs relied on *Central Railway Signal Co. v. Longden*, 194 F.2d 310 (7th Cir. 1952) (presidential dominance prevents laches); *Hill Dredging Corp. v. Risley*, 114 A.2d 697 (N.J. 1955) (laches asserted by the former president in defense); *Bentz v. Vardaman Mfg. Co.*, 210 So.2d 35 (Miss. 1968) (laches and estoppel rejected as basis for tolling where most of complained of misconduct occurred within the 6-year statute).

22. 608 N.E. at 707. The court suggested that plaintiffs-directors long acquiescence may be a breach of their own fiduciary obligations to the corporation. *Id.* at 707. See *Dotlich v. Dotlich*, 475 N.E.2d 331, 343 (Ind. Ct. App. 1985).

and that the trial court's tolling determination, made after a bench trial, was clearly erroneous.²³ The court applied the discovery rule and found that the statute of limitation did not begin to run until the resultant damage from the alleged tortious act could be ascertained through the exercise of ordinary diligence.²⁴

In *Browning*, there was no discussion of the accrual of the cause of action. Yet, because *Browning* involved a dismissal of a complaint, it appears as though the court considered the cause of action to have accrued in 1981 and 1982, when the events occurred and not necessarily when they were discovered.²⁵ Due to the Indiana Supreme Court's recent adoption of the discovery rule for personal injury actions, and its extension to claims for injury to property,²⁶ defendants in most derivative or class actions will likely be subject to the discovery rule.

The limited practical utility of the statute of limitation is further eroded by Indiana Code Section 34-1-2-9, which delays accrual of the statute of limitation when the defendant has concealed the existence of the cause of action from the plaintiff.²⁷ Ordinarily in Indiana, some affirmative action taken by the defendant is required to constitute concealment.²⁸

In a recent case involving a beneficiary's claim against a fiduciary, a trustee of an express trust, the Indiana Supreme Court held that the "plaintiff is charged with the responsibility of exercising due diligence to discover the claims."²⁹ The Indiana Supreme Court's due diligence requirement is more favorable to defendants than the holding in the court of appeal's case of *Dotlich v. Dotlich*.³⁰ In *Dotlich*, which involved a closely held corporation, a corporate director was found to have a fiduciary duty to disclose information to the corporation and to the shareholders.

The use of the discovery rule to determine when a plaintiff's cause of action accrues and the statute of limitation begins to run virtually eliminates the concealment standard provided by Indiana Code section 34-1-2-9. No longer is a plaintiff required to prove her own due diligence and defendant's active

23. *Id.* at 707-08.

24. *Id.* at 708.

25. 616 N.E.2d 1040 (Ind. Ct. App. 1993). Plaintiff *Browning* asserted a cause of action under Indiana Code § 34-4-30-1 (1988) for damages resulting from a criminal act. The court held that "the substance of a claim under Indiana Code § 34-4-30-1 is punitive rather than compensatory" and, as such, the two-year statute of limitation applied. *Id.* at 1046.

26. See *Wehling v. Citizens Nat'l Bank*, 586 N.E.2d 840 (Ind. 1992); *Malachowski v. Bank One, Indianapolis*, 590 N.E.2d 559, 564 (Ind. 1992).

27. IND. CODE § 34-1-2-9 (1988).

28. *Forth v. Forth*, 409 N.E.2d 641, 644-45 (Ind. Ct. App. 1980).

29. *Malachowski v. Bank One*, 590 N.E.2d 559, 563 (Ind. 1992).

30. 475 N.E.2d 331, 341 (Ind. Ct. App. 1985). The Court of Appeals in *INB National Bank* cited *Dotlich* for the proposition that "The statute of limitation for a cause of action against a director in a close corporation for the misappropriation of corporate assets is tolled until the director's wrongful conduct is either disclosed or discovered." *INB National Bank*, 608 N.E.2d 702, 708 (Ind. Ct. App. 1993).

concealment to toll the applicable statute of limitation. The discovery rule merely requires the plaintiff to show that she was unable to discover the harm through the exercise of ordinary diligence.³¹ In either case, the use of a discovery rule or a due diligence standard for concealment is apt to produce questions of fact making summary judgement more difficult. The result may be to increase the frequency of litigation of claims for conduct that took place years ago;³² a result in direct conflict with the purposes of statutes of limitation.³³ Because of the many opportunities that plaintiffs have to escape application of the statute of limitation and the current judicial enthusiasm for the discovery rule, the General Assembly should consider legislative repeal of the discovery rule.

The *Browning* decision contains an interesting discussion of the verification requirement of Trial Rule 23.1 for derivative actions.³⁴ In *Browning*, the plaintiff elected to stand on his unverified complaint and appeal. Initially, the court relied upon authority that failure to verify a complaint, which is required to be verified under the Trial Rules, incurs jurisdictional considerations.³⁵ The court held that the trial court properly dismissed the complaint, due to lack of jurisdiction, under Trial Rule 12(B)(6).³⁶ The *Browning* court then noted that under Trial Rules 41(B) and (E) the judgment was final and appealable and opined that such a dismissal ordinarily would not be an adjudication on the merits.³⁷ The plaintiff was entitled to elect either to amend his complaint as of right under Trial Rules 12(B)(6) and 15(A) or appeal from the order of dismissal.³⁸ The court held that Browning's appeal of the trial court's order dismissing his complaint "rendered the trial court's order an adjudication upon the merits."³⁹ The court noted that: "[b]y electing that course, Browning waived his right to amend his complaint and cannot now claim that the trial court erred in dismissing his complaint with prejudice."⁴⁰ Given the plaintiff's failure to amend and verify the complaint after the jurisdictional defect was brought to his attention, the court's initial decision, that neither the court system nor the defendants should be compelled to devote further resources to the matter, seems correct.

31. INB Nat'l Bank v. Moran Elec. Serv., Inc., 608 N.E.2d 702, 708 (Ind Ct. App. 1993).

32. Malachowski v. Bank One, Indianapolis, 590 N.E.2d 559, 563 (Ind. 1992).

33. Those purposes are to "spare the courts from litigation of stale claims and the citizen from being put to his defence after memories have faded, witnesses have died or disappeared and evidence has been lost." Havens v. Ritchey, 582 N.E.2d 792, 794 (Ind. 1991).

34. Browning v. Walters, 616 N.E.2d 1040 (Ind. Ct. App. 1993), *reh'g granted in part*, 620 N.E.2d 28 (Ind. Ct. App. 1993).

35. 616 N.E.2d at 1044.

36. *Id.*

37. *Id.* (relying upon *City of Hammond v. Board of Zoning Appeals*, 284 N.E.2d 119, 123 (Ind. Ct. App. 1972)).

38. *Id.* at 1044-45 (relying upon *England v. Dana Corp.*, 259 N.E.2d 433, 436 (Ind. Ct. App. 1970)).

39. *Id.*

40. *Browning*, 616 N.E.2d at 1044-45.

On Browning's Petition for Rehearing, the court of appeals reconsidered the issues of whether the failure to verify a derivative action complaint as required by Trial Rule 23.1 is a jurisdictional defect, and whether the trial court erred in dismissing Browning's complaint with prejudice for failure to verify the complaint.⁴¹

Considering the jurisdictional issue, the court distinguished "jurisdiction over a particular case" from subject matter jurisdiction.⁴² The court defined jurisdiction over the case as "the right, authority, and power to hear and determine a specific case within that class of cases over which a court has subject matter jurisdiction."⁴³ As such, "a court can have subject matter jurisdiction over a class of cases and not have jurisdiction over a particular case."⁴⁴

Relying on authority, the court stated that "[w]hen a party has failed to comply with a condition precedent to maintaining an action under the Trial Rules, and another party has made a specific and timely objection, a trial court cannot exercise jurisdiction over the particular case."⁴⁵ With respect to the verification requirement of Trial Rule 23.1, the court held that such verification is jurisdictional and "the trial court was without jurisdiction to consider the merits of Browning's unverified complaint."⁴⁶ The rule requiring verification forces a petitioner to affirm the truth of his averments under the penalties for perjury.⁴⁷ If a petitioner cannot or will not comply with the verification rule, then his or her petition should be dismissed.

The court concluded that the trial court correctly dismissed Browning's unverified complaint with prejudice, but should have allowed him ten days in which to amend his complaint to comply with Trial Rule 23.1.⁴⁸ The rationale of this decision emphasizes both the importance of the pleadings when moving to dismiss a derivative action complaint due to a verification defect and the denomination of the hearing on such a motion.⁴⁹

When a complainant has failed to verify a derivative action complaint a defendant may challenge the trial court's jurisdiction over the case through a

41. *Browning v. Walters*, 620 N.E.2d 28 (Ind. Ct. App. 1993) (opinion on reh'g.).

42. *Id.* at 31.

43. *Id.* (citing *Harp v. Indiana Dep't of Highways*, 585 N.E.2d 652, 659 (Ind. Ct. App. 1992)).

44. *Id.* Clearly a plaintiff who is not willing to affirm the truth of the matters asserted in his complaint does not deserve the consideration of those unverified allegations by the court. *See* IND. R. TRIAL P. 11(B).

45. *Browning*, 620 N.E.2d at 31-32 (citing *Harp v. Indiana Dep't of Highways*, 585 N.E.2d 652, 660 (Ind. Ct. App. 1992)).

46. *Id.* at 32.

47. *See* IND. R. TRIAL P. 11(B).

48. *Browning*, 620 N.E.2d at 33.

49. In *Browning*, defendant moved for dismissal of Browning's complaint pursuant to Trial Rule 12(B)(6) and alleged Trial Rule 41(E) as grounds for dismissal, raising the failure to comply with the verification requirement of Trial Rule 23.1 as grounds.

Trial Rule 12(B)(6) motion to dismiss for failure to state a claim.⁵⁰ A motion to dismiss pursuant to Trial Rule 12(B)(6) does not require a trial court “to conduct a hearing or to give a party an opportunity to respond” prior to granting that motion.⁵¹ Also, a defendant may seek dismissal of the complaint pursuant to Trial Rule 41(E) for failure to comply with the verification requirement; such a dismissal is “with prejudice unless the trial court provides otherwise.”⁵² Trial Rule 41(E) requires a hearing on the motion to dismiss prior to dismissing the action with prejudice.⁵³

Although the trial court held a hearing prior to dismissing Browning’s complaint with prejudice, there was “no reference to Trial Rule 41(E) in the record in any motion or notice of hearing.”⁵⁴ Thus, the *Browning* court concluded that the hearing was conducted on the defendant’s Trial Rule 12(B)(6) motion and that “the specific provisions of Trial Rule 12(B)(6) allowing amendment of the complaint once as of right must control over the general provisions of Trial Rule 41(E) authorizing dismissal with prejudice for failure to comply with the Trial Rules.”⁵⁵ The court of appeals allowed Browning an additional ten days to amend his complaint to comply with the verification requirements of Trial Rule 23.1.⁵⁶

The *Browning* court concluded that the dismissal by the trial court was proper.⁵⁷ Thus, if the motion and hearing had been denominated as being pursuant to Trial Rule 41(E), Browning’s complaint would have been dismissed with prejudice and he would not have been given the opportunity to amend his complaint.

B. Director and Officer Liability Insurance

The Indiana Court of Appeals, in *Lexington Insurance Co. v. American Healthcare Providers*,⁵⁸ recently considered the enforceability of a provision contained in a director and officer liability insurance policy that excludes claims relating to the insolvency or liquidation of any person, including claims asserted by liquidators of insurers or Commissioners of Insurance. The plaintiffs

50. *Id.* at 31. The court also noted that because subject matter jurisdiction is not an issue, a Trial Rule 12(B)(1) motion to dismiss for lack of subject matter jurisdiction would not be proper. *Id.*

51. *Id.* at 32 (quoting *Cobb v. Owens*, 492 N.E.2d 19, 20 (Ind. 1986)).

52. *Id.* The court noted that “‘the failure to comply with these rules’ provision found in Trial Rule 41(E) includes the failure to state a claim under Trial Rule 12(B)(6).” *Id.* (quoting IND. R. TRIAL P. 41(E)).

53. *Id.* (citing *Rumfelt v. Himes*, 438 N.E.2d 980, 983 (Ind. 1982)).

54. *Browning*, 620 N.E.2d at 33.

55. *Id.* at 33.

56. *Id.* The court noted that Browning already had almost one year in which to cure the verification defect but had not done so. *Id.* at 32.

57. *Id.* at 33.

58. 621 N.E.2d 332 (Ind. Ct. App. 1993).

consisted of directors, officers, employees, and agents of American Healthcare (American) and Physician's Choice of Northwest Indiana, Inc. (PCNI). Insurer Lexington, the defendant, provided director and officer liability insurance to American and PCNI.

In February 1989, a petition for the liquidation of PCNI was filed in the Marion Circuit Court. The acting commissioner of the Indiana Department of Insurance was appointed Liquidator of PCNI. The Liquidator filed lawsuits against the directors of PCNI (plaintiffs here) alleging breach of fiduciary duty. The Liquidator alleged that American had obtained preferential transfers from PCNI when American knew PCNI was insolvent, and that the PCNI directors participated in these preferential transfers and thus were liable for the amount of the preferences. The PCNI directors filed a declaratory judgement action claiming that Lexington had a duty to defend them in the suits and to indemnify them for any judgement rendered against them. The directors subsequently settled all claims asserted by the Liquidator. Lexington then moved for summary judgement based upon the insurance policy's exclusion of claims relating to anyone's insolvency or liquidation, including claims asserted by liquidators of insurers or Commissioners of Insurance.⁵⁹ The trial court denied Lexington's motion and certified the denial for interlocutory appeal.⁶⁰ The court of appeals reversed and remanded with instruction that summary judgement be entered in favor of Lexington.⁶¹

The court of appeals in *Lexington Insurance Co.* considered three issues: 1) whether the insurance policy exclusion was ambiguous and only applied to claims of mishandling by the liquidator; 2) whether the exclusion was void for being against public policy; and 3) whether the director plaintiffs were properly notified of the presence of the exclusion.⁶²

The court of appeals found that "[a]s the construction of a contract is a question of law, summary judgement is particularly appropriate when the terms of the contract are unambiguous."⁶³ The court's goal in interpreting the policy is "to ascertain and enforce the parties' intent as manifested in the contract for insurance" and "[w]e will not extend coverage beyond that provided in the contract and we may not rewrite the plain and unambiguous language of the insurance policy."⁶⁴ If the policy is unambiguous then it should be given its

59. The exclusion provided: "Claims based upon, arising out of, due to or involving directly or indirectly the insolvency, receivership, bankruptcy, liquidation or financial inability to pay any Insured, any Insurer or any other person, including claims brought by any insurer guarantee or insolvency fund or any receiver or liquidator of any insurer or any Commission or Superintendent of Insurance."

60. 621 N.E.2d at 335.

61. *Id.* at 341.

62. *Id.* at 335, 338, 340.

63. *Lexington Ins. Co. v. American Healthcare Providers*, 621 N.E.2d 332, 336 (Ind. Ct. App. 1993) (citing *Bicknell Minerals, Inc. v. Tilly*, 570 N.E.2d 1307 (Ind. Ct. App. 1991)).

64. *Id.* at 335 (citing *American Family Mut. Ins. Co. v. National Ins. Assoc.*, 577 N.E.2d 969

plain and ordinary meaning.⁶⁵ Finally, “[a]n insurance policy will be considered ambiguous only if reasonable persons upon reading the contract would differ as to the meaning of its terms, and an ambiguity is not established merely because one party controverts another party’s interpretation of the policy.”⁶⁶

The court of appeals held that the insurance policy’s exclusion “unambiguously applies to the lawsuits filed by the Liquidator.”⁶⁷ The policy “excludes from coverage claims involving the insolvency or liquidation of any other person, including claims brought by the liquidator of any insurer or a Commissioner of Insurance. . . .”⁶⁸ Further, the policy excludes “from coverage claims brought for acts prior to, predating, or before an insolvency or liquidation which lead to or cause an insolvency or liquidation.”⁶⁹ In sum, the plaintiffs were only insured for claims unconnected to an insolvency.

Plaintiffs argued that such an exclusion violated public policy, but could not point to any legislation in support of their claim. The court in *Lexington Insurance Co.* found that “[a]bsent contrary legislation, there is usually no public policy which prevents parties from contracting as they see fit.”⁷⁰ “[T]he power to declare a contract void for being in contravention of sound public policy is a very delicate and undefined power, and, like the power to declare a statute unconstitutional, should be exercised only in cases free from doubt.”⁷¹ Because the directors could not cite legislation that either prohibits exclusions such as were involved here, or requires companies to maintain directors and officers liability insurance, the court held that they failed to establish that the exclusion should be voided.⁷² The court found that the plaintiffs’ request “is better addressed to the General Assembly, as the legislature is the arbiter of public policy in this state.”⁷³

Plaintiffs’ final assertion was that a genuine issue of material fact existed as to whether they received proper notice of the exclusion in PCNI’s renewal policy. The directors requested the court to adopt the general rule that “requires insurers to notify insureds about changes in coverage when insurance policies are renewed.”⁷⁴ The court rejected the plaintiff’s request.⁷⁵ Yet, the court found

(Ind. Ct. App. 1991)).

65. *Id.*

66. *Id.* at 335-36 (citing *Meridian Mut. Ins. Co. v. Cox*, 541 N.E.2d 959 (Ind. Ct. App. 1989)).

67. *Id.* at 336. *See supra* note 59.

68. *Lexington*, 621 N.E.2d at 336.

69. *Id.* at 337.

70. *Id.* at 338 (citations omitted).

71. *Id.* (quoting *Corns v. Clouser*, 36 N.E. 848, 849 (Ind. 1894)).

72. *Id.* at 340.

73. *Lexington Ins. Co.*, 621 N.E.2d at 339.

74. *Id.* at 340. Plaintiffs relied on cases cited in D.C. Barrett, Annotation, *Renewal Policy - Reduction in Coverage*, 91 A.L.R.2d 546 (1963). The general rule holds that in the event no notice is given, the insureds may presume that the renewal is on the same terms as previously agreed. 621 N.E.2d at 340.

that even if such a duty were imposed then Lexington had adequately discharged that duty because its agent had provided PCNI's agent with a letter that both notified PCNI of additional exclusions and included copies of these new exclusions.⁷⁶

In reliance on *Aetna Insurance Co. v. Rodriguez*,⁷⁷ the plaintiffs argued that the notice was ineffective because "insurance brokers are considered agents of the insurer and not the insured."⁷⁸ The court distinguished *Aetna* on the grounds that, in that case, there was only one agent involved and it had dealt directly with the insurer.⁷⁹ Because PCNI's agent "did not make an application for insurance to Lexington and as they did not bind coverage for Lexington," the court concluded that *Aetna* was not applicable.⁸⁰ The court concluded that, as an agency relationship existed, notice of the change in coverage provided to PCNI's agent would be imputed to PCNI.⁸¹

Lexington reaffirms an individual's freedom to contract, and emphasizes the Indiana courts' reluctance to impose policy determinations from the bench. *Lexington* also puts directors and officers of Indiana corporations on notice that such insurance exclusions exist and that Indiana's courts will enforce those exclusions.

C. Shareholder Actions for Corporate Injury

In *Knauf Fiber Glass, GmbH v. Stein*, the Indiana Supreme Court recently considered the conditions under which it is permissible for a shareholder of a corporation to maintain an action in his or her own name to redress an injury to the corporation.⁸² The court noted that, as a general rule, such shareholder actions are not permissible because "allowing the shareholder to sue would amount to 'double counting,'"⁸³ and that Indiana had adhered to this rule for some time.⁸⁴ Indiana courts recognize an exception to the rule "when there is a breach of a duty owed specially to the stockholder separate and distinct from the duty owed to the corporation."⁸⁵

75. 621 N.E.2d at 340.

76. *Id.*

77. 517 N.E.2d 368 (Ind. 1988).

78. 621 N.E.2d at 341 (citing *Aetna Ins. Co. v. Rodriguez*, 517 N.E.2d 386 (Ind. 1988)).

79. *Id.*

80. *Id.*

81. *Id.*

82. 622 N.E.2d 163 (Ind. 1993), *rev'g in part, aff'g in part, and remanding*, *Knauf Fiber Glass, GmbH v. Stein*, 615 N.E.2d 115 (Ind. Ct. App. 1993).

83. *Id.* at 165 (citing *Mid-State Fertilizer Co. v. Exchange Nat'l Bank*, 877 F.2d 1333, 1335 (7th Cir. 1989) (Easterbrook, J.)).

84. *Id.* (citing *Tomlinson v. Bricklayer's Union*, 87 Ind. 308 (1882)). The court of appeals recognized that this rule exists "even where the corporation and the shareholder are the same." 615 N.E.2d at 125.

85. *Stein*, 622 N.E.2d at 165 (quoting *Sacks v. American Fletcher Nat'l Bank*, 279 N.E.2d

The court recognized that such a duty had been found to exist where a bank had required a shareholder to provide a personal guarantee for a loan as a condition of the bank's loan to the shareholder's corporation.⁸⁶ The court also recognized such a duty had been found to exist where a defendant had made promises directly to a shareholder, the breach of which gave rise to a cause of action.⁸⁷ The court of appeals in *Stein* found that such a duty existed and gave rise to independent liability on the part of the defendant.⁸⁸ The supreme court reversed on that issue.⁸⁹

In *Stein*,⁹⁰ Glyn Ashcraft, the plaintiff, was president and sole shareholder of Ashcraft Trucking, Inc. By 1982, Knauf Fiber Glass (KFG), the defendant, utilized Ashcraft Trucking for 75% of its shipping needs. In 1983, KFG notified Glyn Ashcraft of its intention to increase its output and of the concurrent need for more shipping capacity. KFG proposed to split the added volume equally between Ashcraft Trucking and another firm. KFG advised Ashcraft to either expand the company's trucking capacity or lose KFG's business. Glyn Ashcraft chose to expand Ashcraft Trucking's capacity and entered into a financing transaction where: 1) Glyn Ashcraft signed a personal guarantee for the loan; and 2) Knauf Fiberglass and the creditor entered into an escrow agreement, which provided that the amounts due Ashcraft Trucking for the shipment of KFG goods, would be paid into an escrow account to be applied to Ashcraft's loan.⁹¹

After acquiring the trucks, Ashcraft's business did not increase as anticipated because KFG had decided to distribute the available loads among three or four other carriers. Thus, Ashcraft Trucking sustained heavy economic losses and was forced into Chapter 7 liquidation. Glyn Ashcraft was sued on his personal guarantee and filed for bankruptcy. The bankruptcy trustee of Glyn Ashcraft's estate filed a civil action against Knauf alleging breach of contract, promissory estoppel, fraud and constructive fraud.

807, 811 (Ind. 1972)).

86. *Id.* (citing *Sacks v. American Fletcher Nat'l Bank*, 279 N.E.2d 807, 811 (Ind. 1972)).

87. *Id.* at 166 (citing *Buschmann v. Professional Men's Ass'n.*, 405 F.2d 659 (7th Cir. 1969)). In *Buschmann*, the defendant and plaintiff had entered into a pre-incorporation contract "under which the defendant was to provide management for the new corporation in exchange for plaintiff's contribution of assets and guaranty of the new corporation's debt." The court noted "the defendant made promises directly to Buschmann the breach of which gave rise to a cause of action." 405 F.2d at 663.

88. *Stein*, 615 N.E.2d at 126.

89. *Stein*, 622 N.E.2d at 166.

90. The facts are from the appellate opinions which, in turn, were based on the jury's verdict below.

91. A similar arrangement had been entered into in 1979. At that time, Knauf Fiberglass had guaranteed Glyn Ashcraft that it would commit 50% of its outbound loads to Ashcraft Trucking for the year 1979. The president of Knauf had also personally assured Glyn Ashcraft that if the trucks were acquired and the materials shipped, he would ensure Ashcraft would not go out of business. These guarantees were absent from the 1983 negotiations.

The court of appeals applied a negligence standard in determining whether Knauf owed a duty to Glyn Ashcraft.⁹² The court relied on authority that "[i]n determining whether a duty exists we must balance (1) the relationship between the parties, (2) the reasonable foreseeability of harm to the person injured, and (3) public policy concerns."⁹³ Based upon the facts, the court of appeals found that a relationship existed between Glyn Ashcraft and Knauf "which imposed a duty on KFG separate and apart from the duty KFG owed to Ashcraft Trucking."⁹⁴ The court determined that it was foreseeable that if Ashcraft "did not receive the increased business, then the loan for the new trucks could not be paid and creditors would call Glyn's personal guarantee."⁹⁵ Furthermore, "duty is not sacrosanct in itself, but is only an expression of the sum total of those considerations of policy which lead the law to say that the plaintiff is entitled to protection."⁹⁶ The court concluded that KFG owed a duty to Glyn Ashcraft to provide additional outbound shipments of fiberglass, separate and distinct from the duty owed to Ashcraft Trucking.⁹⁷

The Indiana Supreme Court reversed.⁹⁸ The court noted that a close working relationship had developed between KFG and its personnel, and Ashcraft Trucking and Glyn Ashcraft, and that many of the communications between the firms involved Glyn Ashcraft.⁹⁹ Even so, "there was nothing in this dialogue which required Ashcraft to act in any role other than as president and stockholder."¹⁰⁰ Furthermore, "there were no agreements or demands of the sort recognized in *Sacks* or *Buschmann*"¹⁰¹ and "no indication that KFG had asked or urged Glyn Ashcraft to give a personal guarantee."¹⁰² The Indiana Supreme Court concluded that KFG did not owe a duty to Glyn Ashcraft separate and distinct from the duty owed to Ashcraft Trucking and that KFG was entitled to a judgment on the evidence.¹⁰³

Under *Stein*, a person must require or request a shareholder to personally incur a liability before a court will determine that a duty is owed to the shareholder separate and distinct from the duty owed to the corporation. Courts will not lightly imply that such a duty has arisen. *Stein* will protect the parties'

92. 615 N.E.2d at 125.

93. *Krauf Fiber Glass, GmbH v. Stein*, 615 N.E.2d 115 (Ind. Ct. App. 1993). The court relied on *Webb v. Jarvis*, 575 N.E.2d 992 (Ind. 1991). *Webb* involved a negligence claim alleging medical malpractice.

94. 615 N.E.2d at 126.

95. *Id.*

96. *Id.* (quoting *Webb*, 575 N.E.2d at 997).

97. *Id.* The court affirmed a damage award of \$1,722,000.

98. *Krauf Fiber Glass, GmbH v. Stein*, 622 N.E.2d 163, 166 (Ind. 1993).

99. *Id.*

100. *Id.*

101. *Id.* See *supra* notes 78-80 and accompanying text.

102. *Id.*

103. *Stein*, 622 N.E.2d at 166.

rights to negotiate without the concern that courts will imply a separate duty to a shareholder, absent some affirmative request for personal action.

D. Not-For-Profit Corporations and Personal Loan Guarantees

The court of appeals recently considered whether a not-for-profit corporation could guarantee members' loans and mortgage property to secure that guarantee in *Monsignor Bernard P. Sheridan Counsel No. 6138 Knights of Columbus v. Bargersville State Bank*.¹⁰⁴ In that case, the bank loaned \$58,000 to Mr. Schnarr, the president and director of the Knights of Columbus ("K of C"). The loan was secured by Schnarr's promissory note and backed by certain guarantees of K of C and a security interest in K of C property.¹⁰⁵ Schnarr defaulted on the loan and filed for bankruptcy. When the bank sought to enforce K of C's guarantee, K of C refused to honor the request. The bank instituted a lawsuit based on the guarantee and was granted summary judgement. K of C then appealed.

K of C first argued that the trial court erred in not finding the guarantee and mortgage were *ultra vires*, claiming execution of the guarantee and mortgage were not within its corporate powers.¹⁰⁶ The court of appeals found that "[t]he generally recognized power of a corporation to mortgage its real estate is limited to the furtherance of legitimate corporate business."¹⁰⁷ Further, "[i]t is *ultra vires* of a corporation to execute a contract of guaranty not in furtherance of its business, unless the corporation is given express authority to do so by its Board of Directors."¹⁰⁸

The court found ample authority within K of C's Articles of Incorporation to authorize its guaranty and mortgage. K of C's corporate purpose was to assist its members in time of need, and the Articles granted the K of C the "power to purchase, take, hold, lease, rent, sell or mortgage property and to do all other

104. 620 N.E.2d 732 (Ind. Ct. App. 1993).

105. Specifically, the K of C provided: 1) the absolute and unconditional guarantee of prompt and full payment of Schnarr's loan and a warranty that the guarantee was for a corporate purpose executed by K of C through Grand Knight Eugene V. Durchholz and Trustee William R. Beaver, 2) a Certificate of Resolution executed by the Finance Subcommittee of K of C authorizing Durchholz and Beaver to use specified real estate owned by K of C as collateral for Schnarr's loan and to co-sign on Schnarr's loan and certifying the corporation's and the Finance Committee's authority to adopt the resolution, 3) a collateral pledge agreement executed by Durchholz and Beaver on behalf of K of C granting the Bank a security interest in the specified real estate to secure payment of the loan, and 4) a mortgage on the specified real estate executed by Durchholz and Beaver on behalf of K of C to secure K of C's guaranty. *Id.* at 733.

106. For a discussion of challenges to corporate action of business corporations as *ultra vires* see RICHARD E. DEER, INDIANA CORPORATION LAW AND PRACTICE § 12.2 (1992).

107. *Bargersville*, 620 N.E.2d at 734 (citing *First Merchants Nat'l Bank & Trust Co. v. Murdock Realty Co.*, 39 N.E.2d 507, 513 (Ind. Ct. App. 1942)).

108. *Id.* (citing *First Merchants Nat'l Bank & Trust Co. v. Murdock Realty Co.*, 39 N.E.2d 507, 513 (Ind. Ct. App. 1942)).

things incidental, necessary, or convenient in the carrying out" of that purpose.¹⁰⁹ As such, the guaranty and mortgage were not *ultra vires* but "authorized acts in furtherance of K of C's corporate business as provided in its Articles of Incorporation."¹¹⁰

Although the *ultra vires* issue had been settled, the court of appeals went on to state that "courts do not look with favor upon the *ultra vires* defense" and "where a contract has been executed and fully performed by the corporation or the party with whom it contracted, neither party is permitted to insist the contract was not within the power of the corporation."¹¹¹ Because the bank had fully performed under an enforceable contract, K of C would have been estopped from asserting the *ultra vires* defense.¹¹²

The court summarily dismissed K of C's arguments that the execution of the guaranty, mortgage and collateral assignment was prohibited by Indiana Code sections 23-7-1.1-4(c)¹¹³ and 23-7-1.1-15¹¹⁴ of the Indiana Not For Profit Corporation Act.¹¹⁵ The court found that there was no evidence that "K of C executed the guaranty and mortgage to recompense Schnarr for an equivalent service, loss, or expense; therefore, K of C did not violate the prohibition of pecuniary remuneration to its members."¹¹⁶ Finally, "K of C's mortgage merely secured its guaranty to the Bank and was not a loan to Schnarr in violation of [Indiana Code section] 23-7-1.1-15."¹¹⁷

109. *Id.*

110. *Id.* at 735.

111. *Id.* (citing *Frank Bird Transfer Co. v. Massachusetts Bonding & Ins. Co.*, 153 N.E. 816, 818-19 (Ind. Ct. App. 1926)).

112. *Bargersville*, 620 N.E.2d at 735. The court noted that had the bank been in equal fault with K of C in an illegal contract, justice would have required leaving the parties where the court found them. *Id.* n.2. "[T]he equitable doctrine of unclean hands would have [also] prevented the Bank from foreclosing on the mortgages" if the bank had been guilty of intentional misconduct. *Id.*

113. Repealed by Pub. L. No. 179-1991 § 34, 1991 Ind. Acts 2714 (effective Aug. 1, 1991). IND. CODE § 23-7-1.1-4(c) (1988) provided "No corporation shall, by any implication or construction possess the power of engaging in any activities for the purpose of or resulting in the pecuniary remuneration to its members as such, but this provision shall not prohibit reasonable compensation to members for services actually rendered; nor shall the corporation be prohibited from engaging in any undertaking for profit so long as such undertaking does not inure to the profit of its members." Pub. L. No. 96-1993 § 19, 1993 Ind. Acts 3435 provides that the repeal of Indiana Code § 23-7-1.1 does not affect any action taken prior to the repeal. The events here occurred in January of 1988 and the statute was repealed in 1991.

114. Repealed by Pub. L. No. 179-1991 § 34, 1991 Ind. Acts at 2714 (effective Aug. 1, 1991). IND. CODE § 23-7-1.1-15 (1988) provided "No corporation shall make any advancement for services to be performed in the future or shall make any loan of money or property to any officer or director of the corporation." Note that Pub. L. No. 96-1993 § 19, 1993 Ind. Acts 3435 provides that the repeal of Indiana Code § 23-7-1.1 does not affect any action taken prior to the repeal. The events here occurred in January of 1988 and the statute was repealed in 1991.

115. Currently codified at IND. CODE §§ 23-17-1-1 to -30-4 (Supp. 1992).

116. 620 N.E.2d at 736 (citing IND. CODE § 23-7-1.1-4(c) (1988)).

117. *Id.*

The current version of the Indiana Not For Profit Corporation Act permits compensation of directors¹¹⁸ but prohibits a corporation from lending money to or guaranteeing the obligation of a director or officer of the corporation.¹¹⁹ As such, the guarantee issued by K of C would now be expressly prohibited. Although such a loan or guarantee does not affect the borrower's liability on the loan,¹²⁰ the guarantee would be worthless from the bank's perspective. The current Act also provides that not for profit corporations may "on the terms and conditions and for the consideration determined by the board of directors . . . mortgage, pledge, dedicate to the repayment of indebtedness, . . . or otherwise encumber the corporation's property whether or not in the usual course of the corporation's activities."¹²¹ As such, it appears that a not for profit corporation may still make loan guarantees, secured by corporation property, except where the beneficiary is a director or officer of the corporation. With regard to such guarantees, the principles announced in *Monsignor Bernard P. Sheridan Counsel No. 6138 Knights of Columbus v. Bargersville State Bank* are applicable.

*E. Annual Meetings*¹²²

The federal court in Indianapolis recently ordered a business corporation to conduct an annual meeting.¹²³ The court decided that it was not always necessary to wait until the statutory time period for holding annual meetings expires to make an application for a court ordered annual meeting.¹²⁴ Judge Tinder reasoned that "when a party explicitly and publicly states its intention to violate this type of law, it is unreasonable to suggest that the court may not order compliance with a law until the law is violated."¹²⁵ The court relied upon its general equitable powers¹²⁶ and Indiana's special statutory provisions permitting actions against corporations and corporate officers "to compel the performance of any duty resulting from any office, trust or station."¹²⁷

The court concluded that a board of directors' deferral of an annual meeting beyond the statutory deadline is not protected by Indiana's business judgment

118. IND. CODE ANN. § 23-17-12-15 (Burns Supp. 1993).

119. IND. CODE ANN. § 23-17-13-3(a) (Burns Supp. 1993).

120. *Id.* (b).

121. IND. CODE ANN. § 23-17-20-1(a)(2) (Burns Supp. 1993).

122. For a further discussion of the rules with respect to annual meetings, see RICHARD E. DEER, INDIANA CORPORATION LAW AND PRACTICE § 6.2(a)(1) (1991).

123. *IPALCO Enterprises, Inc. v. PSI Resources, Inc.*, No. IP 93-325-C, slip op. at 15 (S.D. Ind. June 18, 1993) (the statutory deadline for the meeting was June 30, 1993).

124. *Id.* at 7-9.

125. *Id.* at 7.

126. *Id.*

127. *Id.* (quoting IND. CODE §§ 34-1-58-1 and 34-1-58-2 (1988)). The court cited with approval *Silver v. Farrell*, 450 N.Y.S.2d 938 (N.Y. Sup. Ct. 1982) and *Ocilla Indus., Inc. v. Katz*, 677 F. Supp. 1291 (E.D.N.Y. 1987). *Id.*

rule.¹²⁸ Explicit and mandatory statutory deadlines are not viewed as matters of discretion about which the courts are prepared to permit the directors a wide latitude.¹²⁹ Although it may be proper to postpone an annual meeting when a corporate board can show a compelling justification, such contentions will be carefully scrutinized in Indiana¹³⁰ and elsewhere.¹³¹

III. CONCLUSION

Last year's reported appellate court decisions probably do not accurately predict the future which is expected to spawn cases that seek to pierce the corporate veil, to impose successor liability, or to hold individuals responsible for various actions or inactions of corporations. Most of the future controversies will probably relate to small or closely-held business corporations and fewer cases will be decided by summary judgment. Given the recent enactment of the BCL and the NPC, substantial legislative changes are not likely.

128. *IPALCO Enterprises, Inc. v. PSI Resources, Inc.*, No. IP 93-325-C at 9 (citing *Miller v. American Tele. & Tele. Co.*, 507 F.2d 759, 762 (3d Cir. 1974)).

129. *Id.* at 9-12.

130. *Id.* at 10. "No level of deference justifies a corporate board's blatant disregard of a statutory deadline." *Id.* at n.9

131. See *Aprahamian v. HBO & Co.*, 531 A.2d 1204, 1206-07 (Del. Ch. 1987); *Blasius Indus., Inc. v. Atlas Corp.*, 564 A.2d 651, 661 (Del. Ch. 1988).

RECENT DEVELOPMENTS IN INDIANA CRIMINAL LAW AND PROCEDURE

SUSAN D. BURKE*

DONALD S. MURPHY**

INTRODUCTION

In 1993, a number of important statutory amendments became effective and questions concerning their applicability have been raised, meriting discussion in this Note. The Indiana Supreme Court once again issued a significant number of decisions affecting procedural areas of criminal law and analyzing the Indiana Constitution. This Note will discuss the statutory amendments first, followed by an analysis of significant case law.

I. STATUTORY ENACTMENTS

Following a spate of decisions dismissing appeals from convictions and sentences entered by magistrates or commissioners,¹ the Indiana General Assembly recently amended several statutory provisions, enlarging the power of such court personnel. The amendments affect sections four, seven and eight of Indiana Code 33-4-7.

The amendment to Indiana Code section 33-4-7-4, setting forth the enumerated powers of magistrates, additionally provides that magistrates may: “[e]nter a final order, conduct a sentencing hearing, and impose a sentence on a person convicted of a criminal offense as described under section 8 of this chapter.”² Indiana Code section 33-4-7-7 also has been amended to except from the limitations on magistrates, actions provided for in the amended Indiana Code section 33-4-7-8,³ and Indiana Code section 33-4-7-8 now provides that “[i]f a magistrate presides at a criminal trial, the magistrate may do the following: (1) Enter a final order. (2) Conduct a sentencing hearing. (3) Impose a sentence on

* Staff Attorney, Indiana Public Defender Council, B.S., 1973, Indiana University; M.S., 1975, Purdue University; J.D., 1985, Indiana University School of Law—Indianapolis.

** Staff Attorney, Indiana Public Defender Council, B.A., 1979, Purdue University; J.D., 1991, Indiana University School of Law—Indianapolis. The authors wish to gratefully acknowledge the assistance of Paula Sites, J.D., 1985, Southern Illinois University School of Law, in preparing information on death penalty legislation.

1. See, e.g., *Hill v. State*, 611 N.E.2d 133 (Ind. Ct. App. 1993); *Scruggs v. State*, 609 N.E.2d 1148 (Ind. Ct. App. 1993); *Walls v. State*, 603 N.E.2d 903 (Ind. Ct. App. 1992); *Richardson v. State*, 602 N.E.2d 178 (Ind. Ct. App. 1992); *Schwindt v. State*, 596 N.E.2d 936 (Ind. Ct. App. 1992).

2. IND. CODE § 33-4-7-4(14) (1993).

3. IND. CODE § 33-4-7-7 (1993).

a person convicted of a criminal offense.”⁴ Prior to these amendments, the above-referenced statutes provided that magistrates did not have the power of judicial mandate and could not enter a final appealable order unless sitting as a judge pro tempore or special judge, and that he or she was to report findings, etc. to the court, which would enter the final order.

Under the newly amended statutes, it would appear that magistrates and commissioners would have the power to enter valid convictions and sentences without requiring approval and adoption by the elected judge, and that convictions and sentences so entered would be appealable final orders. There is, however, a question as to whether the legislature may enact such legislation consistent with the Indiana Constitution.

In *Shoultz v. McPheeters*,⁵ the court struck down an old statute purporting to give master commissioners “all of the power of any judge in vacation.”⁶ The court found this statute to be in direct conflict with the letter and spirit of the Indiana Constitution, and utterly void.⁷ More recently, the Indiana Supreme Court ruled on similar legislation in *State ex rel. Smith v. Starke Circuit Court*,⁸ dealing with statutes providing for the appointment of commissioners in various Indiana counties.⁹ The court found these statutes were also violative of the Indiana Constitution because they attempted to authorize master commissioners to perform plainly judicial acts, and created offices with essentially the same authority and powers as the constitutional courts of general jurisdiction.¹⁰

Relying upon *Shoultz*, the *Smith* court found the statutes at issue went further in conferring powers on the master commissioners than was constitutionally permissible, and were constitutionally deficient because they established an office having virtually equivalent authority to courts established by the constitution.¹¹ The court held that “a commissioner who is selected in this manner must have substantially fewer powers and duties than those granted by the statutes in question” and must have “significantly limited jurisdiction, or his authority must be confined to the performance of non-judicial acts.”¹²

It would seem that the recently enacted amendments conferring the power to enter judgments of conviction and sentence criminal defendants also confer essentially judicial powers. If this is the case, it would appear that the Indiana Constitution may prohibit such delegation of power, and any final judgments and

4. IND. CODE § 33-4-7-8(b) (1993).

5. 79 Ind. 373 (1881).

6. *Id.* at 374 (citing Ind. Rev. Stat. 1881, § 1404).

7. *Id.*

8. 417 N.E.2d 1115 (1981).

9. The statutes at issue were IND. CODE § 33-4-1-74.3 through 33-4-1-74.9. *Smith*, 417 N.E.2d at 1116.

10. 417 N.E.2d at 1122.

11. *Id.* at 1123.

12. *Id.*

sentences of commissioners or magistrates entered under the provisions of the amended statutes are open to challenge in the appellate courts.

On July 1, 1993, new provisions for habitual offender enhancements of sentences also became effective. Significant changes in three statutes were involved in this legislation. First, the category of D felony habitual offenders was eliminated with the repeal of Indiana Code section 35-50-2-7.1.¹³ Second, Indiana Code section 35-34-1-5 was amended to require that when the State intends to seek enhancement of a felony sentence because the defendant is a habitual offender, this enhancement must be alleged in the information no later than ten days after the omnibus date. The third, and most significant, legislation created major revisions in the "regular" habitual offender statute, Indiana Code section 35-50-2-8.

This section now provides that it is the underlying offense that controls the length of an enhancement,¹⁴ hence the abolition of the D felony habitual offender provision. If the underlying felony is class D, the habitual offender enhancement must be in a range from one and one-half to four and one-half years.¹⁵ If the underlying felony is class C, the enhancement must be in a range from four to twelve years.¹⁶ If the underlying felony is class B, the enhancement must be in a range from ten to thirty years,¹⁷ and if the underlying felony is class A, the enhancement must be thirty years.¹⁸

These provisions are a considerable change from the older statutory provisions which called for a basic enhancement of thirty years whenever either the underlying felony or the prior felonies were greater than class D,¹⁹ and to the older D felony enhancement of eight years, used when both the underlying and prior felonies were class D felonies.²⁰ Although both of the older statutes allowed for reductions in the habitual offender enhancements, such reductions

13. IND. PUB. L. 164 - 1993.

14. The provision, as amended, now reads: "The court shall sentence a person found to be a habitual criminal to an additional fixed term that is not less than the presumptive sentence for the underlying offense nor more than three (3) times the presumptive sentence for the underlying offense. However, the additional sentence may not exceed thirty (30) years." IND. CODE § 35-50-2-8(e) (1993).

15. *Id.*

16. *Id.*

17. *Id.*

18. *Id.*

19. IND. CODE § 35-50-2-8 (1990).

20. IND. CODE § 35-50-2-7.1 (1990).

were discretionary only if certain conditions were met,²¹ unlike the totally discretionary ranges available under the amended statute.

Questions have arisen as to the new statute's applicability to persons whose crimes were alleged to have been committed prior to July 1, 1993, but who were being tried and sentenced after that date. Although generally the law in effect at the time a crime is committed controls sentencing, the "Doctrine of Amelioration" holds that if an ameliorative amendment reducing a penalty is enacted subsequent to commission of the crime, but prior to trial and sentencing, it can be applied.²²

Key to determining the applicability of the doctrine in given circumstances is a determination of the legislature's intent as to whether it applies.²³ The legislation amending Indiana Code section 35-50-2-8 does not have a separate savings clause, nor is its applicability specifically stated.²⁴ Although Indiana has a general savings clause,²⁵ it has been held that "[t]his section was enacted to indicate the legislative intent when no intent is expressed or necessarily implied."²⁶ The question then becomes whether the legislature's intent for the statute's application is "necessarily implied." In *Lewandowski v. State*,²⁷ the Indiana Supreme Court ratified the "Doctrine of Amelioration" when it agreed that enactment of an ameliorative sentencing amendment is, in itself, sufficient indication of legislative intent that it be applied where constitutionally permissible, and obviates any need to apply the general savings statute.²⁸

Given the doctrine, it is necessary to determine whether the new habitual offender provisions are "ameliorative" in nature. In *Dowdell*, the court noted that when determining whether one sentence is greater than another, the measure to be used is the maximum severity of the penalty, and not the possible duration of imprisonment.²⁹ When the underlying offense is a class A felony, the length of the new enhancement would stay the same as in the past, and when the underlying offense is a B felony, the maximum enhancement could be as great as that previously imposed. Where the underlying offense is a C or D felony,

21. For example, the D felony habitual enhancement could be reduced by up to four years if three years or more had passed since the defendant was discharged from probation, imprisonment, or parole for the last prior unrelated felony. IND. CODE § 35-50-2-7.1(e) (1990). Additionally, the regular habitual enhancement could be reduced by up to twenty-five years under similar circumstances if ten years had elapsed, and could also be reduced if either a prior conviction or underlying conviction was a class D felony. IND. CODE § 35-50-2-8(e) (Supp. 1990).

22. *Terrell v. State*, 390 N.E.2d 208 (Ind. Ct. App. 1979).

23. *Dowdell v. State*, 336 N.E.2d 699 (Ind. Ct. App. 1975).

24. IND. PUB. L. 164 - 1993.

25. IND. CODE § 1-1-5-1 (1993).

26. *Dowdell*, 336 N.E.2d at 702.

27. 389 N.E.2d 706 (Ind. 1979).

28. *Id.* at 707.

29. 336 N.E.2d at 702.

however, the new penalty is definitely less than that which could have been previously imposed.

Therefore, it would appear that the degree of amelioration involved will depend on the special facts of each case, including any reductions the defendant would have been eligible for under the previous statute. It is clear, however, that in no case could a defendant receive a greater *maximum* enhancement than that available previously.³⁰ It would also seem plausible that any defendant who would have received a reduction in the habitual enhancement under the old system, would likely receive less than the maximum enhancement under the new system.

In other legislation, the time period for bringing sex-related charges has been significantly increased under Indiana Code section 35-41-4-2.³¹ For acts committed after June 30, 1988,³² charges may be brought any time before the alleged victim becomes thirty-one years old.³³ The only exception to this period is that when a person alleged to have committed child molesting is at least sixteen years old, and the alleged victim is not more than two years younger than the perpetrator, the prosecution must be commenced within five years after commission of the offense.³⁴

Although no one contests the tragedy of childhood sexual abuse, the issue of the reliability of previously "repressed" memories would seem to have considerable impact in light of this legislation.³⁵ An extended statute of limitations may raise concerns about the malleable nature of human memory and its reliability, especially if the memory only surfaces many years after the alleged event.³⁶

30. IND. CODE § 35-50-2-8 (1993).

31. IND. CODE § 34-41-4-2 (1993) provides in pertinent part:

(c) A prosecution for the following offenses is barred unless commenced before the date that the alleged victim of the offense reaches thirty-one (31) years of age:

- (1) IC 35-42-4-3(a) (Child molesting).
- (2) IC 35-42-4-5 (Vicarious sexual gratification).
- (3) IC 35-42-4-6 (Child solicitation).
- (4) IC 35-42-4-7 (Child seduction).
- (5) IC 35-46-1-3 (Incest).

32. IND. PUB. L. 232-1993, § 4, provides: "IC 35-41-4-2, as amended by this act, only applies to crimes committed after June 30, 1988."

33. IND. CODE § 35-41-4-2(c) (1993).

34. IND. CODE § 35-41-4-2(d) (1993). Under prior law the class of the offense determined the statute of limitations for child molest offenses; five years after the commission of a Class B, C, or D felony, and no limit for a Class A felony. IND. CODE § 35-41-4-2(a) (1985).

35. Dr. Elizabeth Loftus, a psychology professor at the University of Washington at Seattle and noted expert on childhood memories, cautioned professionals about suggestive probing and uncritical acceptance of repressed memories that return through therapy, noting that tools have not yet been created to distinguish true from false repressed memories. Dr. Elizabeth Loftus, Address at the Centennial Meeting of the American Psychological Association (Aug. 1992).

36. Trial lawyers often use cross-examination to illuminate the unconscious mistakes of

Additionally, it would seem that this extended time in which to bring sex-related charges may cause both the state and the defendant to encounter problems with disappearing or deceased witnesses, lost evidence, and general memory impairment. For example, it would be nearly impossible for a defendant to mount a credible alibi defense to a charge that might have occurred close to thirty years previously. Further, considerable time could be consumed in trials with expert testimony on the accuracy of old memories. Just what kinds of problems may be forthcoming and how frequently very old allegations will be prosecuted remains to be seen.

Indiana's death penalty statute, Indiana Code section 35-50-2-9, was also amended during this session.³⁷ Although the amendment, which became effective July 1, 1993, contains a specific proviso that it apply only to murders committed after June 30, 1993,³⁸ it will be interesting to see if any of its provisions are applied to murders committed before that date.

The legislation contains three main provisions. One amendment provides that the murder of a victim listed by the state or known by the defendant to be a witness against the defendant, with the intent of preventing the victim from testifying, is now an aggravating circumstance supporting a sentence of death.³⁹ In addition, probation and parole officers, community corrections workers, and home detention workers were added to the categories of law enforcement-related victims whose murder constitutes an aggravating circumstance.⁴⁰ It seems clear that even without the clause specifically limiting application of the amendment to murders committed after June 30, 1993, applying these provisions to murders committed before that date would raise *ex post facto* problems.

It is not so clear, however, whether the legislature can restrict application of the other amended provisions to murders committed after June 30, 1993. Perhaps the most significant amendment is the addition of life without parole as an alternative to death.⁴¹ One Superior Court judge found that refusing an instruction on life without parole to a defendant, merely because he was charged with a murder committed before July 1, 1993, would be a denial of equal protection.⁴² The State took an interlocutory appeal of this ruling, and the

witnesses. "Very often, too, the wish to believe is a strong factor in bringing about false testimony." FRANCIS L. WELLMAN, *THE ART OF CROSS-EXAMINATION* 166 (4th ed. 1962). Additionally, studies show that with the passage of time, alleged victims may create false memories, and distort, confuse and embellish their memories. ELIZABETH F. LOFTUS, *WITNESS FOR THE DEFENSE* (1991).

37. IND. CODE § 35-50-2-9 (1993), as amended by IND. PUB. L. 250-1993 § 2.

38. IND. PUB. L. 250-1993, § 3.

39. IND. CODE § 35-50-2-9(b)(13) (1993).

40. IND. CODE § 35-50-2-9(b)(6) (1993).

41. IND. CODE § 35-50-2-9(e), (g) (1993).

42. Judge Carr Darden, of Marion County Criminal Court Six, issued this ruling in the case of *State v. Alcorn*, Cause No. 49G06-9112-CF-170715.

Indiana Supreme Court will rule on it in 1994.⁴³ The amendment also contains a "truth-in-sentencing" provision, requiring that the judge instruct the jury on the full sentencing range available for the defendant.⁴⁴ It is questionable whether there is any state interest that would justify refusing the application of this provision to trials of those whose offenses were committed before July 1, 1993.

The 1993 death penalty amendment provided that the state may not seek a sentence of life imprisonment without parole (LWOP) unless they seek the death penalty, and death penalty filings have decreased significantly over the last few years, in part due to the high costs involved in trying them.⁴⁵ Effective July 1, 1994, however, a direct request for a sentence of LWOP will be available in certain circumstances, even if the death penalty has not been sought.⁴⁶

It is presently assumed that in cases where LWOP is sought as an alternative to death, the cases will be exempt from the coverage of Criminal Rule 24, thus reducing the cost of the trial. With this new LWOP alternative, it is anticipated that there may be continued debate centering around whether LWOP, like the death penalty, is qualitatively "different" from all other punishments so as to require special rules to protect defendants' rights and ensure fairness and reliability in its application. One may certainly argue that the finality of the sentence, with no possibility of parole, and the rigors of a penalty hearing requiring full consideration and weighing of aggravating and mitigating circumstances by the jury, would suggest a qualitative difference. The answer remains to be seen.

In the same Act passed during the 1994 short session, the Indiana General Assembly also added a new chapter to the Indiana Code. This statute, Indiana Code section 35-36-9, also effective July 1, 1994, concerns the application of the death penalty to those who are mentally retarded. The new section, in combination with amendments to Indiana Code section 35-36-2-5 and several

43. *State v. Alcorn*, Cause No. 49S00-9305-DP-585.

44. IND. CODE § 35-50-2-9(d) (1993).

45. In 1990, there were twenty-four death penalty requests filed in Indiana. In 1991 there were twenty-five. Effective January 1, 1992, provisions of Criminal Rule 24 were adopted requiring the appointment of two attorneys to be paid a minimum of seventy dollars per hour, and also requiring provision of adequate investigative, expert, and other assistance. IND. R. CRIM. P. 24(A), (C). Death penalty requests subsequently dropped to eleven in 1992 and eight during the first eleven months of 1993. *See also Accused Won't Face the Death Penalty*, INDPLS. STAR Aug. 18, 1993, at A1.

46. Indiana Code section 35-50-2-9 was amended to allow the state to directly seek a sentence of life imprisonment without parole as an alternative to death, whenever the defendant is otherwise eligible for the death penalty. Pub. L. 158-1994. The same act also added a new section to the Indiana Code, section 35-50-2-8.5. *Id.* This section provides that if a person is convicted of a felony listed under Indiana Code section 35-50-2-2(b)(4) (various serious non-suspendable felonies), and has accumulated two prior unrelated felony convictions (under the same section 2(b)(4)), the state may seek life imprisonment without parole. *Id.* This provision is popularly referred to as "Three strikes and you're out."

other statutes, precludes the application of the death penalty or LWOP alternative to those who meet the criteria for mental retardation.⁴⁷

Because the enactment of these provisions is so recent, they will not be discussed here in depth, but it does appear that the application of the death penalty in Indiana, and the procedures used in its application, are subject to continuing controversy and change. The influence of political, economic, and moral factors will probably never be absent where such a severe and irreversible sanction is involved.

II. CASE LAW DECISIONS

A. *Double Jeopardy*

In 1993, the United States Supreme Court overturned its rather short-lived decision in *Grady v. Corbin*,⁴⁸ concerning double jeopardy considerations in which subsequent prosecutions were involved. Traditionally, the Double Jeopardy Clause had prohibited multiple convictions and subsequent prosecutions where two or more offenses involved only the same elements.⁴⁹ This principle became known as the *Blockburger*⁵⁰ test. In *Grady*, however, the Court held that in addition to passing the *Blockburger* test, subsequent prosecutions must also pass a "same conduct" test to survive double jeopardy analysis.⁵¹ The "same conduct" principle held that if, to establish an essential element of an offense in a subsequent prosecution, the government must prove conduct constituting an offense for which the defendant has already been prosecuted, double jeopardy barred the subsequent prosecution.⁵²

This "same conduct" test was rejected in 1993, in *United States v. Dixon*,⁵³ in favor of adherence to the original *Blockburger* test. The Court, with multiple concurrences and dissents, found the *Grady* decision to have become unworkable and to have produced confusion.⁵⁴ The majority believed *Grady* to have been badly reasoned, and not constitutionally-rooted.⁵⁵ In Indiana, however, the

47. Section 2 of Indiana Code section 35-36-9 defines a mentally retarded individual as one "who, before becoming twenty-two (22) years of age, manifests: (1) significantly subaverage intellectual functioning; and (2) substantial impairment of adaptive behavior; that is documented in a court ordered evaluative report." The new provision also provides that determination of whether a defendant is mentally retarded is to be made by the court after a pretrial hearing (sections 4 and 5); and that if the court finds the defendant is mentally retarded, the portion of the charge seeking the death sentence shall be dismissed (section 6). P.L. 158-1994.

48. 495 U.S. 508 (1990).

49. Neither offense had a unique element that was not a part of the other offense.

50. *Blockburger v. United States*, 284 U.S. 299 (1932).

51. *Grady*, 495 U.S. at 510.

52. *Id.*

53. 113 S. Ct. 2849 (1993).

54. *Id.* at 2860-64.

55. *Id.*

impact of this return to the traditional *Blockburger* analysis is somewhat diminished.

In *Shipley v. State*,⁵⁶ the court considered multiple convictions for murder and neglect of a dependent, and found convictions for both offenses were precluded by the double jeopardy provisions of Article I, Section 14 of the Indiana Constitution.⁵⁷ The court recognized the recent decision in *United States v. Dixon*,⁵⁸ but found it was bound by the Indiana Supreme Court's interpretation of double jeopardy in light of the Indiana Constitution.⁵⁹ Although different statutory elements underlay the offenses of murder and neglect of a dependent, the court found an examination of the factual bases alleged to support the offenses was also required.⁶⁰

The information against Shipley for murder alleged that between certain dates she knowingly or intentionally killed her daughter.⁶¹ The information for neglect of a dependent alleged that between the same dates she placed her daughter in a situation that may have endangered her life or health, resulting in serious bodily injury.⁶² The court determined that both charges were based on the same acts occurring over the same time period, and that double jeopardy precluded convictions for both because "one offense was the instrument by which the other was committed."⁶³ Essentially, the murder was committed through the pattern of neglect. In reaching this conclusion, the court distinguished other cases where the pattern of neglectful acts was independent from the acts actually causing death.⁶⁴

In *Derado v. State*, the Indiana Supreme Court also considered the importance of examining the way in which offenses are charged.⁶⁵ In *Derado*, the court found that multiple convictions for dealing in cocaine and for conspiracy to deal cocaine were precluded. The court also found that while double jeopardy does not necessarily bar convictions for both a conspiracy to commit a felony and the underlying felony, it does bar such convictions if the overt acts alleged in furtherance of the conspiracy are the same acts supporting the conviction for the underlying felony.⁶⁶ Derado did not actually deliver any cocaine; his convictions for dealing were based upon accomplice liability. The information charging him with dealing alleged that he and a co-defendant

56. 620 N.E.2d 710 (Ind. Ct. App. 1993).

57. *Id.* at 718.

58. 113 S. Ct. 2849.

59. *Shipley*, 620 N.E.2d at 717, n.2.

60. *Id.* at 717.

61. *Id.*

62. *Id.*

63. *Id.*

64. *Id.* at 718. See, e.g., *Bean v. State*, 460 N.E.2d 936 (Ind. 1984); *Gasaway v. State*, 547 N.E.2d 898 (Ind. Ct. App. 1989).

65. 622 N.E.2d 181 (Ind. 1993).

66. *Id.* at 184.

knowingly delivered cocaine to various persons on five occasions.⁶⁷ The conspiracy information alleged the same parties agreed to commit the offense of dealing, with the overt acts in furtherance of the conspiracy being the delivery of the cocaine by the co-defendant.⁶⁸ Therefore, Derado's acts relative to the conspiracy were the same acts giving rise to his accomplice liability for the offense.

Although cognizant of the "same elements," or *Blockburger* test,⁶⁹ the court noted that the manner in which offenses are charged must also be considered,⁷⁰ and that where, *as charged*, the acts involved the same necessary elements, double jeopardy will preclude multiple convictions.⁷¹ Although the offense of dealing in cocaine requires actual delivery, and conspiracy to deal does not require delivery, but does require proof of an agreement to deal plus an overt act in furtherance of the conspiracy; in this case the State chose to allege commission of the dealing as the overt act in furtherance of the conspiracy. Therefore, the State was required to prove no facts to obtain a conviction for dealing beyond those necessary to obtain a conspiracy conviction.⁷²

The court limited its holding, however, to those instances in which the information and instructions relied upon the same facts to prove both accomplice liability on the underlying offense and the overt act in furtherance of the conspiracy.⁷³ The decision therefore did not necessarily affect the case law holding that convictions for both an underlying felony and conspiracy to commit that felony were possible.⁷⁴

B. Confessions and Admissions

The Indiana Supreme Court considered the admissibility of a juvenile's confession in *Stidham v. State*.⁷⁵ After allegedly killing the decedent, Stidham and his friends drove to Illinois where he was arrested and gave a statement.⁷⁶ Illinois, unlike Indiana, does not require a guardian or parent to be present when a suspect under eighteen years of age waives his or her *Miranda* rights. Therefore, the confession would have been admissible under Illinois law.⁷⁷ The

67. *Id.* at 182.

68. *Id.*

69. See *supra* notes 50-53 and accompanying text (discussing *Blockburger*).

70. *Derado*, 622 N.E.2d at 183 (citing *Tawney v. State*, 439 N.E.2d 582 (Ind. 1982)).

71. *Id.* at 184.

72. *Id.*

73. *Id.*

74. *Id.* See, e.g., *United States v. Felix*, 112 S. Ct. 1377 (1992); *Witte v. State*, 550 N.E.2d 68 (Ind. 1990).

75. 608 N.E.2d 699 (Ind. 1993).

76. *Id.* at 700.

77. *Id.*

Indiana Supreme Court, however, found the confession inadmissible under Indiana law and reversed Stidham's conviction.⁷⁸

Indiana Code section 31-6-7-3 makes a juvenile's statement inadmissible at trial unless his counsel, custodial parent, guardian, or guardian *ad litem* is present and both the child and his advisor waive the right to be silent.⁷⁹ Although the State argued that because the confession was admissible where taken, it should be admissible in Indiana, the court noted that the question was the admissibility of the statement in Indiana, not Illinois.⁸⁰ The court also rejected authority from other jurisdictions that would have found the statement admissible because Indiana Code section 31-6-7-3 is quite specific about requirements for admissibility.⁸¹ The fact that Stidham was an emancipated minor also had no impact on the court's decision because there was no such exception in the statute.⁸²

The Indiana Court of Appeals ruled another juvenile's confession admissible, however, in *Sevion v. State*.⁸³ Although the confession was admissible because seventeen year-old Sevion was not "in custody," making the safeguards of Indiana Code section 31-6-7-3 inapplicable, the court also addressed whether the safeguards were met in the situation presented.⁸⁴

Before taking Sevion's statement, the officer tried to reach his relatives, but his parents were both incarcerated and his mother had placed him in the care of an eighteen year-old.⁸⁵ He was accompanied to the police station by the eighteen year-old, and both were advised of his rights and signed the waiver form.⁸⁶ Subsequently, Sevion gave a videotaped statement admitting to shooting the victim.⁸⁷

Although the eighteen year-old was a witness to the crime and his car was nearby, the court found there was no evidence he had a gun in his possession, and that he only heard the shot.⁸⁸ The court therefore determined that his custodian did not have an interest adverse to Sevion.⁸⁹ The court found that the State was placed in an awkward position because Sevion's custodian was also a witness, but determined that the situation could have been remedied only by the appointment of a guardian *ad litem*. Such an appointment, however, would have defeated the purpose of having someone familiar and friendly with whom

78. *Id.* at 701.

79. IND. CODE § 31-6-7-3 (1993).

80. *Stidham*, 608 N.E.2d at 701.

81. *Id.*

82. *Id.*

83. 620 N.E.2d 736 (Ind. Ct. App. 1993).

84. *Id.* at 738-39.

85. *Id.* at 739.

86. *Id.*

87. *Id.*

88. *Id.*

89. *Id.* at 739. If the custodian had an adverse interest, he would not have met the requirements of IND. CODE § 31-6-7-3 to be a proper advisor.

the juvenile could consult.⁹⁰ While basing the admissibility of the confession on the non-custodial nature of the interrogation, the court also concluded that the procedures followed complied with the statute's protections.⁹¹

In *Thomas v. State*,⁹² the court held that the defendant's admission contained in a Child in Need of Services (CHINS) Agreed Entry was admissible in his subsequent criminal trial.⁹³ Thomas and his wife, with the advice of counsel, entered into an agreement in the CHINS proceeding, stipulating that their daughters were the victims of sex offenses.⁹⁴ In Thomas' subsequent trial for child molesting, the agreement was entered against him, although he argued it was an involuntary confession.⁹⁵

The court noted that in *Hastings v. State*, a statement given to a welfare worker as part of a requirement to regain child custody was ruled involuntary and inadmissible in the defendant's criminal trial because the caseworker was acting as an agent of the government in the course of securing a conviction.⁹⁶ The *Thomas* court distinguished *Hastings*, however, because in Thomas' case the document specifically indicated that he was aware of its contents and signed it voluntarily with the advice of counsel.⁹⁷ The document contained language advising the parties that they could not be compelled to enter into the agreement against their will and that they were entering into the agreement of their own free will, without any threats, promises or coercion.⁹⁸ Because Thomas gave the statement voluntarily, it was therefore admissible against him in his criminal trial.⁹⁹

C. Procedural Decisions

In *Campbell v. State*,¹⁰⁰ the Indiana Supreme Court held that the exclusion of a defendant's own alibi testimony, due to a failure to comply with Indiana Code section 35-36-4-1,¹⁰¹ was an unconstitutional infringement on the right of the accused to testify, as guaranteed by Article I, Section 13 of the Indiana Constitution.¹⁰² Campbell was precluded at trial from introducing any

90. *Id.*

91. *Id.*

92. 612 N.E.2d 604 (Ind. Ct. App. 1993).

93. *Id.*

94. *Id.* at 606.

95. *Id.* (citing *Hastings v. State*, 560 N.E.2d 664 (Ind. Ct. App. 1990)).

96. *Id.* at 607.

97. *Id.*

98. *Id.* at 606-07.

99. *Id.* at 607.

100. 622 N.E.2d 495 (Ind. 1993).

101. This section provides that when a defendant plans to offer evidence of alibi, he must file notice of his intention not later than twenty days prior to the omnibus date if he is charged with a felony. IND. CODE § 35-36-4-1 (1993).

102. This section provides in part that: "[i]n all criminal prosecutions, the accused shall

evidence related to his alibi defense, including his own testimony, because he did not timely file a notice of alibi.¹⁰³ In an offer to prove at the close of the State's case, Campbell stated he was at his sister's home during the time the crimes were committed, and that they would both testify to that fact.¹⁰⁴

After looking at decisions from other jurisdictions and reviewing its past position on this issue,¹⁰⁵ the court looked to Article I, Section 13 of the Indiana Constitution, finding its language placed a "unique value upon the desire of an individual accused of a crime to speak out personally in the courtroom and state what in his mind constitutes a predicate for his innocence of the charges."¹⁰⁶ The court also found that surprise testimony by a defendant is rarely overwhelming, and that a continuance for the State would be appropriate to meet any surprise.¹⁰⁷

The court concluded that in light of the strong constitutional bias in favor of personal testimony of the accused and the remedy of a continuance, exclusion of the testimony was an unjustified and overbroad intrusion on the right of an accused to testify on his own behalf.¹⁰⁸ Because in Campbell's case the crucial issue was the credibility of the victim and her identification of her attacker, the court also determined that the exclusion of his alibi testimony was not harmless error.¹⁰⁹

This decision once again illustrates how the Indiana Constitution is a unique document distinct from the United States Constitution. It appears that at trial and on initial appeal, the arguments were based solely upon federal constitutional grounds.¹¹⁰ The court, however, recognizing that the Indiana Constitution was implicated, ordered supplemental briefs to be filed.¹¹¹ Additionally, in his concurrence to the decision, Chief Justice Shepard made it clear that the decision was being based upon Indiana's Bill of Rights.¹¹²

In *Bell v. State*,¹¹³ the court considered the admissibility of a confession given during questioning as part of a failed plea agreement.¹¹⁴ During processing following his arrest, Bell initially denied being present at the crime scene and told the detective he would make a statement only if he received a

have the right . . . to be heard by himself and counsel." IND. CONST. art. I, § 13.

103. *Campbell*, 622 N.E.2d at 497.

104. *Id.*

105. The court observed that in *Lake v. State*, 274 N.E.2d 249 (Ind. 1971), it adopted reasoning precluding such testimony, but that it was going to reconsider its position. *Id.* at 498.

106. *Id.*

107. *Id.*

108. *Id.* at 499.

109. *Id.*

110. *Id.*

111. *Id.* at 497-98.

112. *Id.* at 501 (Shepard, C.J., concurring).

113. 622 N.E.2d 450 (Ind. 1993).

114. *Id.* at 451.

“deal.”¹¹⁵ Eventually the prosecutor was called and after negotiations, they arrived at a plea agreement.¹¹⁶

The agreement, which the prosecutor signed, also required Bell to make a truthful and factual statement and testimony.¹¹⁷ After accepting the agreement, Bell gave a recorded statement confessing to hitting and robbing the victim, but refused to sign it once the statement was transcribed.¹¹⁸ His confession was subsequently admitted at his trial, over his objection.¹¹⁹

The court agreed with Bell that his statement was given in the course of discussing a plea agreement and therefore could not be used against him at trial, finding the confession both involuntary under the Fifth Amendment to the United States Constitution,¹²⁰ and privileged under Indiana Code section 35-35-3-4, which makes verbal or written communication concerning plea agreements inadmissible at trial if the agreement does not culminate in approval by the court.¹²¹ The purpose of Indiana Code section 35-35-3-4 is to facilitate the final disposition of charges through the communicative process of a negotiation free of legal consequences, and this policy protects both the State and the defendant.¹²² “Statements made as part of plea negotiations as well as evidence of actual agreements, and all of their parts, are declared inadmissible.”¹²³

The court held that judicial approval and acceptance of an agreement were the lone events that could lift the “protective cloak” that generally rendered confessions during negotiations inadmissible.¹²⁴ Because Bell refused to sign the confession, and consequently there was no judicial approval of the agreement, the statute rendered it inadmissible at trial.¹²⁵ The court also found the confession involuntary and inadmissible under the Fifth Amendment privilege providing protection against compulsory self-incrimination, because Bell’s statement, when made, resulted from the prosecutor’s direct or implied promises.¹²⁶

In *Farrell v. State*,¹²⁷ the court recognized limitations on the length of jury deliberations.¹²⁸ The Indiana Supreme Court granted transfer of a court of

115. *Id.* at 452.

116. *Id.*

117. *Id.* n.2.

118. *Id.* at 452.

119. *Id.*

120. *Id.* at 453.

121. *Id.*

122. *Id.*

123. *Id.* The court found this rule of inadmissibility mirrors its federal counterpart, FED. R. CRIM. P. 11(e)(6)(D). *Id.* Additionally, it is consistent with Indiana Rule of Evidence 410, effective January 1, 1994. *Id.* n.3.

124. *Id.* at 453.

125. *Id.*

126. *Id.*

127. 622 N.E.2d 488 (Ind. 1993) [hereinafter *Farrell II*].

128. *Id.*

appeals decision¹²⁹ to hold that the trial court abused its discretion in not calling a recess and sequestering a jury that had deliberated for thirty hours without sleep.¹³⁰ The jury began deliberations after three days of trial.¹³¹ During deliberations the jury presented several questions to the trial court, and there was concern both with the ability of the jury to reach a unanimous decision and with whether the jury was too tired to continue its deliberations.¹³² Because the jury had reached verdicts on some counts, however, the judge allowed them to continue deliberations even though they already had been deliberating through the night.¹³³ After approximately thirty hours without sleep, the jury returned verdicts of guilty on all counts.¹³⁴

Although rejecting Farrell's argument that the trial court abused its discretion in refusing to earlier declare a hung jury, the court did find an abuse of discretion in expecting the jury to deliberate so long without sleep.¹³⁵ While a trial court is generally given sound discretion to determine how long a jury should be permitted to deliberate, it must also conduct trials to ensure fairness and protect the rights of all concerned.¹³⁶ The court noted that verdicts must be based on the evidence presented, not the ability of jurors to remain awake and rational for thirty hours, and that trial courts must be careful not to let economic considerations outweigh the process of fairness.¹³⁷ After noting the effects of sleep deprivation on judgment, the court found Farrell was entitled to a new trial because of the possibility that the verdict was suspect.¹³⁸ The court recognized that giving the jurors a break would have meant more expense to the county due to sequestration, but while not mandating curfews for juries, it stated that "[w]e have dispensed with trial by ordeal for litigants, and should do so for jurors as well."¹³⁹

In *State v. Owings*,¹⁴⁰ the Indiana Supreme Court found that the trial court had erred in ruling the deposition of an unavailable witness inadmissible.¹⁴¹ Upon the State's successful appeal of the trial court's ruling,¹⁴² Owings petitioned for transfer. The Indiana Supreme Court agreed with the court of

129. *Farrell v. State*, 612 N.E.2d 124 (Ind. Ct. App. 1993) [hereinafter *Farrell I*].

130. *Farrell II*, 622 N.E.2d at 493.

131. *Id.* at 490.

132. *Id.* at 490-92.

133. *Id.* at 492.

134. *Id.*

135. *Id.*

136. *Id.*

137. *Id.*

138. *Id.* at 493.

139. *Id.*

140. 622 N.E.2d 948 (Ind. 1993).

141. *Id.* at 953.

142. *State v. Owings*, 600 N.E.2d 568 (Ind. Ct. App. 1992).

appeals that the use of the deposition at trial would not deny Owings' right of confrontation, and that it was sufficiently reliable to be admitted.¹⁴³

As part of pretrial discovery, Owings' counsel deposed an essential prosecution witness who later committed suicide.¹⁴⁴ Owings had visited her son in prison and allegedly passed him two balloons filled with cocaine.¹⁴⁵ The witness was another inmate who testified in the deposition that Owings' son said Owings had smuggled cocaine in to him.¹⁴⁶ Owings did not attend the deposition, nor did she request to be present, although the deposition took place at the prison and defense counsel indicated she had been banned from that facility.¹⁴⁷ The trial court denied use of the deposition at trial based on its unreliability and that it would constitute a denial of the right to confrontation.¹⁴⁸

The supreme court reviewed the right to confrontation under both the Sixth Amendment of the United States Constitution and Article I, Section 13 of the Indiana Constitution, and found that although the Indiana Constitution is more protective of that right than the United States Constitution,¹⁴⁹ neither provision has been interpreted to guarantee defendants all rights of confrontation at every trial for every witness.¹⁵⁰ The court then noted that criminal defendants generally have no constitutional right to attend depositions because the confrontation right applies only to proceedings where defendants may suffer the loss of liberty or property.¹⁵¹ A deposition for discovery is not considered such a proceeding.¹⁵² The court recognized that admission at trial of a deposition that a defendant was not permitted to attend, taken by the State and given by an unavailable witness, may violate the right of confrontation.¹⁵³ The right is an individual privilege relating to trial procedure, however, and may be waived if there is an intentional relinquishment or abandonment of that right.¹⁵⁴ Waiver may occur by word or deed, and where the record does not show that the defendant is unable to attend a deposition, or that he objects to it, he waives his confrontation right, even if the witness is unavailable to testify at trial.¹⁵⁵

143. 622 N.E.2d at 950-53.

144. *Id.* at 950.

145. *Id.*

146. *Id.*

147. *Id.* at 953.

148. *Id.* at 950.

149. *Id.* at 950-51 (citing *Brady v. State*, 575 N.E.2d 981 (Ind. 1991)).

150. *Id.* at 951.

151. *Id.*

152. *Id.* at 951-52.

153. *Id.* at 952.

154. *Id.* (citing *Phillips v. State*, 543 N.E.2d 646, 648 (Ind. Ct. App. 1989)).

155. *Id.*

Where defense counsel takes the deposition and actively participates, the right to confrontation may be deemed waived.¹⁵⁶

To render a deposition admissible at trial, the statement must bear sufficient "indicia of reliability."¹⁵⁷ This reliability requirement is generally satisfied where the testimony is taken by defense counsel who comprehensively questions the witness about his memory and perception of the crime, possible bias, and veracity of his testimony.¹⁵⁸ The focus is not on whether the court believes the witness is telling the truth, but on the process by which the statement was obtained, and decisions on the admission of depositions will be reversed only for abuse of discretion.¹⁵⁹

The court found that here the trial court abused its discretion because the witness was definitely unavailable, and the deposition had sufficient indicia of reliability because it was given under oath, subject to penalties for perjury, and recorded by a court reporter.¹⁶⁰ Although defense counsel argued that officials banned Owings from the place of deposition, the court found no specific request was made to enter the institution for the deposition, or that it be taken elsewhere.¹⁶¹ Under the circumstances, therefore, the court found Owings waived her right to face-to-face confrontation, and that the deposition should be admissible at trial.¹⁶²

In his dissent, Justice DeBruler argued that a waiver of the confrontation right should be declared only when there is an intelligent personal decision to forego the right, without coercion, and with full awareness of the right.¹⁶³ The court did not address the fact that the deposition was taken for purposes of discovery only. Therefore it seems clear that defense counsel will have to be very careful about their clients' participation in any kind of deposition in the future. The use of a record to establish agreements on the purposes and admissibility of depositions might be one way to deal with this issue. This decision, however, would seem to have applicability to civil law as well as criminal law, because of the common practice of making a distinction between "discovery" depositions and those taken to preserve testimony, even though the trial rules make no such distinction.¹⁶⁴ It also raises a question about whether the rules should be amended to make such a distinction.

156. *Id.*

157. *Id.*

158. *Id.*

159. *Id.*

160. *Id.* at 953.

161. *Id.*

162. *Id.*

163. *Id.* (DeBruler, J., dissenting).

164. Trial Rule 32(A)(3)(A) provides that a deposition may be used by any party for any purpose if the witness is dead.

In *Harrell v. State*,¹⁶⁵ the state filed an information against a defendant in October, 1986, but did not arrest him until February, 1992. The defendant argued that the delay violated his constitutional right to a speedy trial.¹⁶⁶ In an interlocutory appeal, the court discussed this claim in light of both *Doggett v. United States*¹⁶⁷ and *Barker v. Wingo*.¹⁶⁸ The court noted that the speedy trial right does not come into play until a person in some way becomes "accused," and found Harrell assumed this role when the information was filed against him in October, 1986.¹⁶⁹ Once a defendant becomes the accused, the conduct of both the prosecution and the defendant are weighed. The court found Harrell met the threshold test of *Doggett*, by showing the interval between the accusation and trial had become presumptively prejudicial, thus mandating further inquiry.¹⁷⁰

Although the State claimed it was unable to serve Harrell's warrant because he had moved around and was absent from the state for considerable periods of time, the court found that the record did not show the State had attempted with reasonable diligence to serve the warrant.¹⁷¹ Because the ultimate responsibility to bring a defendant to trial rests with the State, the court found the government was more to blame for the delay than was Harrell.¹⁷² The court also noted that Harrell asserted his right shortly after his arrest, and the State did not contest the balancing of this factor in his favor.¹⁷³

During her deposition, the alleged victim displayed an apparent and substantial lack of clarity in her memory about the alleged incidents.¹⁷⁴ Because the evidence in the case would be based largely upon her credibility versus Harrell's, the court concluded that he was likely prejudiced by the lapse of time due to difficulty in cross-examining and impeaching the alleged victim.¹⁷⁵ Overall, the court found that an absence of reasonable diligence by the state, coupled with a demonstrated lack of clarity in the alleged victim's memory due to the delay, constituted sufficient prejudice to show a violation of Harrell's constitutional right to a speedy trial.¹⁷⁶ The court noted, however, its preference for making such rulings subsequent to trial rather than during the pretrial stage, and concluded that to prevail at this early stage, defendants must

165. 614 N.E.2d 959 (Ind. Ct. App. 1993).

166. *Id.* at 962.

167. 112 S. Ct. 2686 (1992).

168. 407 U.S. 514 (1972).

169. *Harrell*, 614 N.E.2d at 963.

170. *Id.* at 965.

171. *Id.* at 964.

172. *Id.*

173. *Id.*

174. *Id.* at 965.

175. *Id.* at 966.

176. *Id.* at 967.

show the demonstrable prejudice caused by delay is unlikely to be overcome by events at trial.¹⁷⁷

In *Lahr v. State*,¹⁷⁸ however, the court found no unreasonable delay in the defendant's retrial after a successful appeal.¹⁷⁹ The time limitations of Indiana Criminal Rule 4(C) do not apply in retrial situations, and retrial must occur only within a "reasonable" time based on constitutional speedy trial rights.¹⁸⁰ The relevant period to consider is that which elapses from certification of the appellate decision to the time of retrial.¹⁸¹ In Lahr's case, that period was a little over eighteen months.¹⁸²

In determining whether the period was reasonable, the court relied primarily upon *Barker v. Wingo*¹⁸³ and *O'Neill v. State*,¹⁸⁴ noting that the length of a presumptively prejudicial delay is dependent upon the peculiar circumstances of a case.¹⁸⁵ The court also found no question that Lahr's eighteen month delay was sufficient to trigger further inquiry.¹⁸⁶ Under the *Barker* test, the court should consider the following factors: length of delay, reasons for delay, timeliness and vigor of the assertion of speedy trial rights, and any prejudice to the defendant from the delay.¹⁸⁷ In Lahr's case, the court concluded that the reasons for delay did not weigh in his favor, and that his assertion of rights was not particularly vigorous or timely because he did nothing prior to objecting to the trial setting and requesting discharge.¹⁸⁸ The court also found insufficient prejudice to Lahr, even though he claimed the memory of one of his witnesses may have been eroded by the lapse of time, and that his levels of anxiety and concern had been unnecessarily and exponentially increased by the delay.¹⁸⁹ The court dismissed the first claim because the witness was able to answer some questions even though she had some memory loss.¹⁹⁰ Because Lahr was not incarcerated during the period, concerns about his anxiety also were not sufficient to find the delay unreasonable.¹⁹¹ The court therefore concluded that Lahr was not denied his constitutional right to a speedy trial.¹⁹²

177. *Id.*

178. 615 N.E.2d 150 (Ind. Ct. App. 1993).

179. *Id.* at 154.

180. *Id.* at 151.

181. *Id.* at 151-52.

182. *Id.* at 152.

183. 407 U.S. 514 (1972).

184. 597 N.E.2d 379 (Ind. Ct. App. 1992).

185. *See also Lahr*, 615 N.E.2d at 152, n.3 (court discusses various decisions finding and failing to find prejudice).

186. *Id.* at 152.

187. *Id.* (citing *Barker*, 407 U.S. at 530).

188. *Id.* at 153.

189. *Id.*

190. *Id.*

191. *Id.* at 153-54.

192. *Id.* at 154.

D. Sentencing Issues

In 1992, the "earned credit time" statute, Indiana Code section 35-38-1-23, was enacted, allowing criminal defendants to petition for a reduction of their sentence under certain circumstances.¹⁹³ Even defendants with nonsuspendible sentences may receive a reduction in their remaining sentences if "the person has successfully completed an educational, a vocational, or a substance abuse program that the department has determined to be appropriate."¹⁹⁴ Shortly after passage of this statute, its applicability to persons sentenced under plea agreements was questioned.¹⁹⁵

In *Thompson v. State*,¹⁹⁶ the court of appeals held that those sentenced under a plea agreement calling for a term of years are not entitled to a sentence reduction under the earned credit time statute.¹⁹⁷ The court emphasized the contractual nature of plea agreements, a rationale also relied upon by the supreme court in *State ex rel. Goldsmith v. Marion County Superior Court*.¹⁹⁸ The court in *Thompson* presumed that the legislature knew specified sentences in plea agreements could not be modified under the rationale of *Goldsmith* at the time it enacted the reduction of sentence statute.¹⁹⁹ Therefore, it assumed the legislature would have included a specific provision extending the statute's coverage to plea agreements, if such had been the legislature's intent.²⁰⁰

The *Thompson* court, however, did not discuss the fact that the role of the prosecutor in the shock probation statute,²⁰¹ discussed in *Goldsmith*, is substantially different from that of the prosecutor in the earned credit time statute.²⁰² The earned credit time statute does not call for the approval or even the participation of the prosecutor, as does the sentence modification statute. This difference would seem to suggest a legislative intent that the two statutes are to be treated differently.

In *Scheckel v. State*,²⁰³ the Indiana Supreme Court vacated a sixty year sentence for Class A felony murder because the trial court had listed no

193. IND. CODE § 35-38-1-23 (1993).

194. IND. CODE § 35-38-1-23(a)(4) (1993).

195. Susan D. Burke, *Update-Criminal Law and Procedure*, 26 IND. L. REV. 891 (1992). One of the issues raised was that the statute on its face addresses rehabilitation shown during the period of incarceration, something that could not have been known at the time of the plea bargaining and sentencing.

196. 617 N.E.2d 576 (Ind. Ct. App. 1993).

197. *Id.* at 578.

198. *Id.* (citing *State ex rel. Goldsmith v. Marion County Superior Court*, 419 N.E.2d 109, 114 (Ind. 1981)).

199. *Id.* at 579.

200. *Id.*

201. IND. CODE § 35-38-1-17 (1993).

202. IND. CODE § 35-38-1-23 (1993).

203. 620 N.E.2d 681 (Ind. 1993).

mitigating circumstances.²⁰⁴ The trial court either erroneously overlooked or did not properly consider substantial evidence of mitigation in the record.²⁰⁵ During the sentencing hearing, fourteen persons, including a co-worker, a pastor, and family members, testified that Scheckel was loving, trusted, caring, helpful, and not mean-natured.²⁰⁶ The witnesses also portrayed him as a good worker with much promise, and as one who served as a hospital orderly, volunteered in a children's tumbling program, and assisted with church activities.²⁰⁷ Additionally, defense counsel presented evidence that Scheckel had been sexually molested as a child, and was involved in a car accident in which a mother of two was killed.²⁰⁸ He received no counseling for either event.²⁰⁹

The trial court's only statement about this mitigation evidence was that none existed.²¹⁰ The court noted that "[w]hile a trial court is not obligated to explain why it has not chosen to make a finding of mitigation, . . . [it] may not ignore facts in the record which would mitigate the offense."²¹¹ Accordingly, the court vacated the sentencing order and remanded the case because evidence of mitigators was overlooked or not properly considered.²¹²

E. Substantive Criminal Offenses

The offense of Resisting Law Enforcement (RLE) was examined in several decisions. In *Spangler v. State*,²¹³ the Indiana Supreme Court clarified the meaning of the RLE statute, Indiana Code section 35-44-3-3.²¹⁴ When a deputy sheriff attempted to serve Spangler with a protective order and related papers, a verbal altercation ensued.²¹⁵ After Spangler refused to accept service, he was first arrested for disorderly conduct, and subsequently for RLE.²¹⁶ It was agreed that Spangler's resistance to the deputy was active, not passive, but

204. *Id.* at 686. The opinion also explains how the trial court erred in considering certain circumstances as aggravators. *Id.* at 684. See also *Stover v. State*, 621 N.E.2d 664 (Ind. Ct. App. 1993) (in imposing enhanced sentence, trial court failed to particularly identify relevant aggravating and mitigating factors, therefore case remanded for imposition of presumptive sentences or a particularized statement in support of aggravation).

205. *Id.* at 686.

206. *Id.*

207. *Id.*

208. *Id.*

209. *Id.*

210. *Id.*

211. *Id.* at 685.

212. *Id.* at 686.

213. 607 N.E.2d 720 (Ind. 1993).

214. IND. CODE § 35-44-3-3 states in part: "Sec. 3(a) A person who knowingly or intentionally: . . . (2) forcibly resists, obstructs, or interferes with the authorized service or execution of a civil or criminal process or order of a court commits resisting law enforcement. . . ."

215. *Spangler*, 607 N.E.2d at 722.

216. *Id.*

that it did not involve physical force.²¹⁷ At issue was whether the resistance was “forcible” as defined in the statute.²¹⁸

The court noted that “forcibly” appears directly before the word “resists” in the statute, and concluded that it is a required element of the crime.²¹⁹ Mere action to resist, absent a showing of force, does not fall within the prohibitions of the statute.²²⁰ The court also concluded that “forcibly” modifies and applies to the entire string of verbs in the statute: resists, obstructs, or interferes.²²¹

In considering what constitutes force, the court found the common denominators of all definitions are the use of strength, power, or violence, applied by someone to accomplish a desired end.²²² Additionally, Indiana Code section 35-41-1-11 consistently defines a forcible felony as one involving the use or threat of force against another, or in which there is imminent danger of bodily injury to another.²²³ The court therefore concluded that: “[w]e believe that one ‘forcibly resists’ law enforcement when strong, powerful, violent means are used to evade a law enforcement official’s rightful exercise of his or her duties.”²²⁴ Although Spangler’s resistance was active, the court determined it was not “forcible” as defined by statute, and reversed his conviction.²²⁵

The court of appeals also considered the offense of RLE in *Touchstone v. State*,²²⁶ when it held that where three officers were involved in subduing and transporting the defendant who resisted arrest, only one of three convictions for RLE could stand because RLE is an offense against lawful authority, not a person.²²⁷ The court rejected the State’s argument that separate incidents of resisting occurred when Touchstone was placed under arrest and when they arrived at the police station, finding the facts supported only a single incident of resisting even though Touchstone apparently stopped resisting during the drive to the station.²²⁸

In *Price v. State*,²²⁹ the Indiana Supreme Court conducted a lengthy exposition interpreting Article I, Section 9 of the Indiana Constitution as it impacts on the offense of disorderly conduct. That section states: “No law shall be passed, restraining the free interchange of thought and opinion, or restricting the right to speak, write or print, freely, on any subject whatever: but for the

217. *Id.*

218. *Id.*

219. *Id.* at 723.

220. *Id.* at 724.

221. *Id.* at 723.

222. *Id.*

223. IND. CODE § 35-41-1-11 (1993).

224. *Spangler*, 607 N.E.2d at 723.

225. *Id.* at 725.

226. 618 N.E.2d 48 (Ind. Ct. App. 1993).

227. *Id.* at 49.

228. *Id.*

229. 622 N.E.2d 954 (Ind. 1993).

abuse of that right, every person shall be responsible.”²³⁰ Price was convicted under the statutory section that made it illegal to make an unreasonable noise and continue to do so after being asked to stop.²³¹

Price was arrested in the early morning hours of New Year’s day.²³² Her arrest arose from a noisy altercation between police and multiple “party-goers” when she “screamed” profanities at an officer while objecting to another’s arrest and then to her own.²³³ After several verbal exchanges, the officer told Price to desist or he would arrest her for disorderly conduct, and she responded, “F—you. I haven’t done anything.”²³⁴ The Indiana Court of Appeals upheld her conviction in *Price v. State*.²³⁵

Pursuant to a transfer petition, the supreme court took the opportunity to expound on the free speech provision of the Indiana Constitution. The court first examined what constituted “abuse” of the right of free speech, and concluded that “[t]o the extent that Ind. Code Ann § 35-45-1-3(2) permits the State to impose a material burden upon the free exercise of political speech, it cannot stand.”²³⁶ The court noted that although violation of a rational statute generally would constitute “abuse” of the rights extended in the constitution, the State cannot punish expression, if to do so would impose a “material burden upon a core constitutional value.”²³⁷

After examining the history surrounding the Indiana Constitution and its amendments, the Indiana Supreme Court concluded that political speech did constitute a “core constitutional value.”²³⁸ The court next determined that when political speech that does not harm any particular individual is treated and punished as abuse, there is a material burden placed on this core constitutional value.²³⁹ To determine when such speech is properly considered as abusive, the court looked to tort law, and held that “political expression becomes ‘unreasonably noisy’ for purposes of Ind. Code Ann. § 35-45-1-3(2) when and only when it inflicts upon determinant parties harm analogous to that which would sustain tort liability against the speaker.”²⁴⁰

In examining the facts of Price’s conviction, the court first determined that her act constituted political speech, primarily because it was a protest concerning the legality and appropriateness of police conduct.²⁴¹ The court concluded that

230. IND. CONST. art. I, § 9.

231. IND. CODE § 35-45-1-3(2) (1993).

232. *Price*, 622 N.E.2d at 956.

233. *Id.* at 956-57.

234. *Id.* at 957.

235. 600 N.E.2d 103 (Ind. Ct. App. 1992).

236. *Price*, 622 N.E.2d at 963.

237. *Id.* at 960.

238. *Id.* at 963.

239. *Id.* at 964.

240. *Id.*

241. *Id.* at 961.

while Price's behavior would support finding she created a public nuisance, and that her "victims," the neighborhood residents, were identified with sufficient specificity, the harm that was suffered did not rise above a fleeting annoyance.²⁴² Therefore, punishment for her actions under Indiana Code section 35-45-1-3(2) was impermissible under the Indiana Constitution.²⁴³

The court also examined Price's conviction under the First and Fourteenth Amendments to the United States Constitution, and concluded that the code section at issue was not overbroad or vague in violation of these provisions.²⁴⁴ Because there was insufficient evidence to support her conviction under the constitutionally permissible interpretation of Indiana Code section 35-45-1-3(2), however, the case was remanded for entry of acquittal on the disorderly conduct charge.²⁴⁵ In a dissent by Justice Dickson, joined in by Justice Givan, the majority opinion was construed to be sending a message that anyone confronted by imminent arrest could react with unlimited noise and vulgarity, so long as a protest about police conduct is included.²⁴⁶ It will be interesting to see how this decision is used in future cases, especially in light of its extensive constitutional interpretation and language reminiscent of that used in more mellifluous legal opinions of the past.²⁴⁷

An opportunity to consider the reach of the *Price* decision may be forthcoming, if further action is taken on a previous disorderly conduct decision, *Borchert v. State*.²⁴⁸ Borchert was convicted under the identical provision of the disorderly conduct statute, Indiana Code section 35-45-1-3(2), for making unreasonable noise.²⁴⁹ His conviction arose out of an abortion protest conducted with approximately twenty-five others, in a public alley nearly 150 feet from an abortion clinic.²⁵⁰ Protestors yelled at escorts leading patients from their cars to the clinic.²⁵¹

An off-duty police officer, acting as a security guard, received complaints from those inside the clinic that Borchert could specifically be heard above the rest, and that he was disturbing patients and staff, shouting things like, "Mommy don't kill me."²⁵² The officer approached Borchert, informed him that he could

242. *Id.* at 964.

243. *Id.* at 964-65.

244. *Id.* at 967.

245. *Id.*

246. *Id.* at 969 (Dickson, J., dissenting).

247. See, e.g., "[t]he machinery of democracy produces a sonorous cacophony, not a drone. . . . [T]he efficacy of political speech often depends upon its ability to jar and galvanize." *Id.* at 963.

248. 621 N.E.2d 657 (Ind. Ct. App. 1993).

249. *Id.* at 658.

250. *Id.* at 657.

251. *Id.*

252. *Id.* at 658.

be heard inside the building, and warned him to quiet down.²⁵³ When the same problem subsequently arose, the officer attempted to arrest Borchert, and he was eventually charged and convicted of disorderly conduct.²⁵⁴

The court rejected Borchert's argument that his conviction violated his right to engage in constitutionally protected free speech, relying in large part on the overruled *Price*²⁵⁵ decision for the proposition that the prosecution of unreasonable noise constituting a public nuisance did not violate free speech rights.²⁵⁶ It was specifically noted that in *Price* the court had recognized that Indiana's Constitution seemed to enable the state to enact statutes punishing unreasonably loud speech.²⁵⁷ The court concluded that while evidence of loudness alone does not constitute unreasonable noise, and reasonableness must be determined in the context of the circumstances, the facts presented supported a finding that Borchert did utilize unreasonable noise.²⁵⁸ Therefore, the court concluded that there was no violation of the right to free speech and upheld his conviction.²⁵⁹

Under the analysis of the new *Price*²⁶⁰ decision, it would appear that whether the court of appeals' decision will stand depends largely on whether Borchert's speech is considered reflective of a "core constitutional value." If it is, it would seem that his conviction would impose a "material burden" on the exercise of his rights *if* the harm to identifiable victims is not significant enough to give rise to liability under tort theory.²⁶¹ This last hurdle may, however, distinguish Borchert's situation from that present in *Price*. It certainly seems conceivable that the damage to the "victims" in *Borchert* could be considered more significant than that suffered by *Price*'s neighbors. If the protesters dissuaded any patients from entering the clinic, or if the patients or staff inside suffered any significant emotional distress, it would seem that these two cases could be easily distinguished. Whether this will occur remains to be seen.

In *Miller v. State*,²⁶² the court reversed the defendant's conviction for Class B felony confinement because of a fatal variance between the charging information and the proof at trial.²⁶³ Evidence adduced at trial showed that when confining the victim, Miller used a pellet gun.²⁶⁴ Although pellet and BB guns have been considered deadly weapons,²⁶⁵ the court found the evidence

253. *Id.*

254. *Id.*

255. 600 N.E.2d 103.

256. *Borchert*, 621 N.E.2d at 658-59.

257. *Id.* at 658.

258. *Id.* at 659.

259. *Id.* at 660.

260. 622 N.E.2d 954.

261. See discussion of *Price*, 622 N.E.2d at 964, *supra* note 236.

262. 616 N.E.2d 750 (Ind. Ct. App. 1993).

263. *Id.* at 755-56.

264. *Id.* at 755.

265. See, e.g., *Glover v. State*, 441 N.E.2d 1360 (Ind. 1982); *Williams v. State*, 451

insufficient to support elevation of the crime to a Class B felony because the information specifically charged Miller with confinement with a *handgun*.²⁶⁶ Indiana Code section 35-42-3-3 provides that the crime of confinement is a Class B felony if it is committed while armed with a deadly weapon,²⁶⁷ but here the state chose to specify that the deadly weapon at issue was a handgun.²⁶⁸

After examining the definition of a "handgun," the court concluded that the state clearly established that Miller's pellet gun did not fit the definition.²⁶⁹ Consequently, there was a variance between the crime as charged and the evidence at trial.²⁷⁰ During trial, defense counsel relied on the information as charged and the fact that a pellet gun was not a firearm.²⁷¹ Therefore, the variance at issue required reversal of Miller's conviction for the enhanced confinement.²⁷²

F. Impact of Federal Decisions

In *Tague v. Richards*,²⁷³ the court held that exclusion, under Indiana's Rape Shield Statute,²⁷⁴ of testimony suggesting that a child molest victim had prior hymenal damage violated the accused's Sixth Amendment right to effective cross-examination.²⁷⁵ However, the court held that the Confrontation Clause error in this habeas proceeding was harmless because the victim's venereal disease directly supported her allegations that the defendant had molested her.²⁷⁶

Indiana's Rape Shield Law prohibits a defendant charged with a sex crime from introducing any evidence of the victim's past sexual conduct.²⁷⁷ There are three exceptions.²⁷⁸ On direct examination of the examining physician, the

N.E.2d 687 (Ind. Ct. App. 1983).

266. *Miller*, 616 N.E.2d at 756.

267. IND. CODE § 35-42-3-3 (1993).

268. *Miller*, 616 N.E.2d at 754.

269. *Id.* at 754-55.

270. *Id.* at 755.

271. *Id.*

272. *Id.* at 755-56.

273. 3 F.3d 1133 (7th Cir. 1993).

274. IND. CODE § 35-37-4-4 (1993).

275. *Tague*, 3 F.3d. at 1138.

276. *Id.* at 1140. *Tague* would not be entitled to habeas relief based on a trial error unless he could establish that it resulted in "actual prejudice." *Id.* This new standard overrules the harmless beyond a reasonable doubt standard previously applied to determine whether a Confrontation Clause error requires a grant of habeas relief. *See Brecht v. Abrahamson*, 113 S. Ct. 1710, 1722 (1993) (citing the standard announced in *Kotteakos v. United States*, 328 U.S. 750, 776 (1946)).

277. IND. CODE § 35-37-4-4(a) (1993).

278. These exceptions are: (1) evidence of past sexual conduct with the defendant, (2) evidence which in a specific instance of sexual activity shows some other person committed the crime, and (3) evidence that the victim's pregnancy was not caused by the defendant. IND. CODE

state introduced evidence that the child victim had an enlarged hymen, which was consistent with her having been sexually abused.²⁷⁹ However, on cross-examination, the trial court excluded the doctor's testimony that the child reported prior sexual activity with her father.²⁸⁰ Additionally, the court excluded expert opinion that such unwanted sex with the father was consistent with the damage to the hymen.²⁸¹ The Indiana Supreme Court upheld the exclusion of this evidence as not falling within any exceptions to the Rape Shield Statute.²⁸²

The Seventh Circuit Court of Appeals concluded that while Indiana's rape shield statute has been held facially constitutional, the constitutionality of the law as applied to preclude exculpatory evidence remains subject to examination on a case by case basis.²⁸³ In this case, excluding evidence indicating another possible source of hymenal damage significantly hampered Tague's efforts to rebut the source of that damage. The court found that in the absence of any testimony of prior sexual experience, the jury would likely presume that hymenal damage to an eleven-year-old girl was the result of the alleged molestation.²⁸⁴ Thus, the application of the rape shield law denied Tague the right to ensure that evidence admitted against him is "reliable and subject to the rigorous adversarial testing that is the norm of Anglo-American criminal proceedings."²⁸⁵ The court held this infringement on Tague's confrontation right was harmless, however, because there was an inadequate showing that exclusion of the testimony substantially prejudiced the result of the trial.²⁸⁶

In *Splunge v. Clark*,²⁸⁷ Splunge, a black male, was convicted of murder and robbery.²⁸⁸ The prosecutor used two of his peremptory challenges to exclude the only two black venire members from the jury.²⁸⁹ A divided

§ 35-37-4-4(b)(1)-(3). There may be a fourth exception. See *Rhom v. State*, 558 N.E.2d 1100, 1103 (Ind. 1990) (court indicated it was inclined to hold the Rape Shield Act inapplicable to evidence of the complainant's intent to engage in sexual conduct in the future).

279. *Tague*, 3 F.3d. at 1136.

280. *Id.*

281. *Id.*

282. *Tague v. State*, 539 N.E.2d 480 (Ind. 1989).

283. *Tague v. Richards*, 3 F.3d. at 1137.

284. *Id.* at 1138. See also *United States v. Begay*, 937 F.2d 515, 523 (10th Cir. 1991) (when the prosecution specifically relied on an enlarged hymen as evidence of molestation, the Confrontation Clause required admission of cross-examination testimony regarding another sexual assault that provided an alternative explanation of the condition).

285. *Id.* (quoting *Maryland v. Craig*, 497 U.S. 836, 846 (1990)).

286. *Id.* at 1140. The court found that even if the excluded testimony had been admitted, it would not explain evidence of a vaginal discharge which began to appear shortly after the alleged assaults by Tague. *Id.*

287. 960 F.2d 705 (7th Cir. 1992).

288. *Id.* at 706.

289. *Id.*

Indiana Supreme Court affirmed the conviction.²⁹⁰ However, on petition for a Writ of Habeas Corpus, the Seventh Circuit Court of Appeals affirmed the district court's grant of the writ, unless Splunge was retried within 120 days.²⁹¹ The court found the prosecutor had excluded one black citizen from jury service solely due to her race.²⁹²

First, the court applied the criteria set forth in *Batson v. Kentucky*²⁹³ and determined that Splunge had established a *prima facie* case of purposeful race-based discrimination.²⁹⁴ The court noted that the burden then shifts to the state to furnish a neutral explanation for challenging black jurors.²⁹⁵ The *Splunge* court found the prosecutor's explanation to be a pretext for race-based discrimination that did not meet this burden of the state.²⁹⁶ The court stated, "this circuit has taken a deadly serious approach to *Batson*."²⁹⁷ It added that the state of Indiana "might have adopted a like commitment to observing this constitutional safeguard if it so adamantly desired to avoid relitigation."²⁹⁸

III. CONCLUSION

Although many of the significant decisions this year focused on evidentiary principles, such as the refinement of "other misconduct" evidence in light of *Lannan v. State*²⁹⁹ and its progeny, one judicial thread woven through many of the criminal law decisions is the increased use of the Indiana Constitution as a basis for holdings. Indiana's Constitution was strongly reflected in *Shipley v. State*,³⁰⁰ *Derado v. State*,³⁰¹ *Campbell v. State*,³⁰² *State v. Owings*,³⁰³ and

290. *Splunge v. State*, 526 N.E.2d 977 (Ind. 1988).

291. *Splunge*, 960 F.2d at 710.

292. *Id.* at 709.

293. 476 U.S. 79 (1986). *Batson* stands for the proposition that when the state puts a black defendant on trial before a jury from which members of his race have been purposefully excluded, it denies him equal protection of the law. To meet the test of *Batson*, the defendant must show that: 1) he or she is a member of a cognizable racial group, 2) the prosecutor exercised peremptory challenges to remove persons of the defendant's race from the venire, and 3) the facts and relevant circumstances raise an inference that the prosecution used those challenges to exclude members of the venire from the petit jury on the basis of race. *Splunge*, 960 F.2d at 707.

294. *Id.*

295. *Id.* at 708.

296. *Id.* at 708-09. The court noted that the prosecution asked only black venire members whether their race would influence their decision in the case, and asked one black venire member whether anyone he knew had been charged with robbery or murder, while asking the next three white venire members whether they or their friends had been victims of robbery. *Id.* at 707-08.

297. *Id.* at 709.

298. *Id.*

299. 600 N.E.2d 1334 (Ind. 1992).

300. 620 N.E.2d 710 (Ind. Ct. App. 1993).

301. 622 N.E.2d 181 (Ind. 1993).

302. 622 N.E.2d 495 (Ind. 1993).

probably most notably and extensively in *Price v. State*.³⁰⁴ Given the history of individualism in Indiana, this reliance on its Constitution seems appropriate. It is also clear that the courts will be looking to arguments based on the Indiana Constitution, and that those who forget its reach may pay a price.

303. 622 N.E.2d 948 (Ind. 1993).

304. 622 N.E.2d 954 (Ind. 1993).

TEACHER BARGAINING IN INDIANA: THE COURTS AND THE BOARD ON THE ROAD LESS TRAVELED

LISA B. BINGHAM*

INTRODUCTION

Indiana has twenty years of experience with collective bargaining for certificated educational employees.¹ From its inception, the Indiana Certificated Educational Employee Bargaining Act (the Act) represented an experiment combining mandatory bargaining with mandatory discussion of certain bargaining subjects.² The Indiana Education Employment Relations Board (the Board) and the state courts have taken a unique direction in public employee bargaining. In some respects, the rules in Indiana depart from prevailing public and private traditions. This Article will survey and summarize the decisions of the Indiana courts interpreting the Act. In particular, the Article will examine amendments following the Act's initial adoption; review the decisions of Indiana courts on bargaining unit determinations, elections, the Board's remedial powers, and the structure of bargaining subjects under the Act; and examine how the Board and the courts have handled the specific areas of school calendar, teacher evaluation, teacher dismissal, school committees, and fair share fees under the Act. The Article will also examine how the courts have reviewed arbitration awards interpreting teacher collective bargaining agreements. This Article is not a comprehensive summary of the decisions of the Board; instead it attempts to examine how the Board has fared in the courts. Finally, it suggests alternate approaches to certain kinds of cases arising under the Act. Labor relations involves a dynamic relationship, exerting forces of its own on any statutory framework. The Indiana legislature chose to limit the scope of mandatory bargaining and expand those issues subject to mandatory discussion. However, the dynamics of the labor relationship often force the parties, the courts and the Board to obscure these statutory boundaries. It might be simpler for all to live with a broader scope of mandatory bargaining on wages, hours, and conditions

* Assistant Professor, Indiana University School of Public and Environmental Affairs. J.D., 1979, University of Connecticut; A.B., 1976, Smith College. The author gratefully acknowledges the assistance of staff at the IEERB, Richard Darko, Esq.; research assistant Paul Wright (a candidate for the J.D. and M.P.A. degrees at the Indiana University School of Law and School of Public and Environmental Affairs); and clerical assistant Shannon Decker.

1. Indiana Certificated Educational Employee Bargaining Act, IND. CODE § 20-7.5-1-1 to -1-14 (1993) (often referred to as CEEBA), Ind. Public Law No. 217, approved Apr. 24, 1973 [hereinafter the Act]. The Act establishes the Indiana Education Employment Relations Board, often referred to as IEERB [hereinafter the Board].

2. See Symposium, *A Year of Teacher Bargaining in Indiana*, 50 IND. L.J. 284 (1975) for a review of the basic structure of the Act. See also Note, *Determining the Scope of Bargaining Under the Indiana Education Employment Relations Act*, 49 IND. L.J. 460 (1973).

of employment than to reconcile the conflicting demands of negotiation, discussion, and managerial discretion.

I. THE POWER AND JURISDICTION OF THE BOARD

A. A Brief History

Indiana authorized collective bargaining for teachers in 1973.³ The Board has jurisdiction only over certificated school employees.⁴ As is true in most states, public employees in Indiana do not have the right to strike.⁵ Indiana has a turbulent history with respect to collective bargaining for other public employees. The legislature adopted collective bargaining for municipal employees in 1975 through Public Law 254.⁶ Governor Bowen vetoed a separate bill intended to extend collective bargaining rights to police officers and firefighters.⁷ In 1977, the Indiana Supreme Court declared unconstitutional Indiana's collective bargaining statute for public employees.⁸ The state

3. See Barbara Doering, *Bargaining and Discussion: Is it a Happy Marriage?*, 50 IND. L.J. 284, nn.1-3 (1975) for references on the turbulent debate concerning teacher bargaining and unsuccessful prior attempts to pass a bargaining law.

4. IND. CODE § 20-7.5-1-2(f) (1993) defines "certificated employee" as a person whose contract with the school corporation requires he hold a license or permit.

5. See Edward P. Archer, *Labor Law, 1980 Survey of Recent Developments in Indiana Law*, 14 IND. L. REV. 413 (1981) for an account of an illegal teacher strike in the Indianapolis Public Schools. See also Martin H. Malin, *Public Employees' Right to Strike: Law and Experience*, 26 U. MICH. J.L. REF. 313 (1993) (suggesting that public employees should have the right to strike). As an indication of the climate for public employee bargaining, Indiana courts have gone so far as to authorize a civil cause of action by property owners against individual striking fire fighters for damage that resulted when those fire fighters failed to report to a fire. *Boyle v. City of Anderson*, 497 N.E.2d 1073 (Ind. Ct. App. 1986). However, an elementary student has no cause of action against teachers for damages allegedly sustained when they participated in an illegal strike. *Coons v. Kaiser*, 567 N.E.2d 851 (Ind. Ct. App. 1991). See Barbara J. Fick, *Labor and Employment Law, 1991 Survey of Recent Developments in Indiana Law*, 25 IND. L. REV. 1311 (1992) for a more complete discussion.

6. Pub. L. No. 254, 1975 Ind. Acts 1354, originally codified at IND. CODE §§ 22-6-4-1 to -4-3 (1977) (repealed 1982).

7. Ind. H.R. 1053, 99th Gen. Assembly, 1st Sess. (1975), vetoed Apr. 17, 1975; for a discussion on this legislation and its veto, see Edward L. Suntrup, *Enabling Legislation for Collective Action by Public Employees and the Veto of Indiana House Bill 1053*, 9 IND. L. REV. 994 (1976).

8. *Indiana Educ. Employment Relations Bd. v. Benton Community Sch. Corp.*, 365 N.E.2d 752 (Ind. 1977). In *Benton*, the court held that the statute precluded judicial review of the Board's bargaining unit determination and certification of an exclusive bargaining representative. The court observed that this Indiana law differed from the National Labor Relations Act (NLRA). 29 U.S.C. §§ 151-169 (1988). Under the NLRA, an employer could contest a bargaining unit determination by refusing to bargain, and thereby forcing the union to file an unfair labor practice charge. In the absence of a severability clause, the court struck down the entire bargaining law. No substitute was ever enacted. A court subsequently held that a school employer may condition bargaining with non-teaching school employees on employees' agreement to use bargaining

legislature has repeatedly considered and failed to authorize bargaining for state employees, notably in each of the last four legislative sessions.⁹ Governor Evan Bayh established a separate Indiana Public Employee Relations Board (PERB) for state employees by executive order.¹⁰ The PERB supervises the election process and certifies exclusive representatives among state employees in anticipation that the legislature will eventually adopt collective bargaining.¹¹ Until mandatory collective bargaining is adopted, the state has engaged in voluntary collective bargaining with exclusive representatives of state employees and concluded several collective bargaining agreements under the executive order.¹² Thus, the Indiana Education Employment Relations Board administers a teacher bargaining law, but at present has no jurisdiction over other categories of public employees.

The Act creates three categories into which it divides the traditional subjects of collective bargaining. Specifically, it renders some subjects bargainable, some discussable, and some matters of school board discretion.¹³ While the Act has been amended a number of times since its passage, all but two of those amendments

representatives who were either employees of the school system or were lawyers. *Michigan City Area Schools v. Siddall*, 427 N.E.2d 464 (Ind. Ct. App. 1981). The court reasoned that Public Law 254 was declared unconstitutional, and no substitute had been passed; thus, the employer was not obligated to engage in collective bargaining even with the majority representative of non-certificated employees. Since all bargaining was voluntary, the employer could condition that bargaining upon the employees' agreement to a specific category of representative. The court held it was not a First Amendment violation to attach a condition precedent to non-mandatory bargaining. See Edward P. Archer, *Labor Law, 1982 Survey of Recent Developments in Indiana Law*, 16 IND. L. REV. 225, 228 (1983) for a more complete discussion.

9. See 1993 Indiana House Bill No. 1135, 1993 Indiana House Bill No. 1306, 1993 Indiana House Bill No. 1467, 1993 Indiana House Bill No. 1678, 1993 Indiana Senate Bill No. 106, and 1993 Indiana Senate Bill No. 217 for examples of such attempts during the 1993 legislative session.

10. Exec. Order No. 90-6 Establishing Procedures for Recognition of Employee Organizations Representing Employees of the Executive Branch, 13 Ind. Reg. 10 (July 1, 1990). See also Mitzi H. Martin & Todd M. Nierman, *Survey of Recent Developments in Indiana Employment Law*, 24 IND. L. REV. 951, 967 (1991).

11. 13 Ind. Reg. 10, 1925-1930 (July 1, 1990).

12. Copies of the first set of such collective bargaining agreements are available from the author, and on file with the *Indiana Law Review*.

13. For a more complete discussion, see *infra* Part III and accompanying notes.

are essentially technical.¹⁴ The most substantive one¹⁵ expands those subjects to be discussed.¹⁶ It appears to limit the exercise of management's right to take most ordinary personnel actions by requiring that those actions be effectuated through procedures established by bargaining or discussion with the teacher union. The Board has adopted a series of regulations governing its administration of the Act.¹⁷

B. The Scope of Judicial Review for Board Decisions

In general, the courts have applied the usual standards for review of an administrative agency to the Board's decisions.¹⁸ Under Indiana's Administrative Adjudication Act,¹⁹ courts will uphold a Board decision supported by substantial, reliable and probative evidence. The Board is charged with making determinations of fact. The courts will not review a Board decision by weighing conflicting evidence which appears in the record. If there is any substantial evidence to support the Board's finding, the courts will not disturb it.²⁰

14. See Pub. L. No. 1, § 5, 1974 Ind. Acts 3; Pub. L. No. 93, § 1, 1974 Ind. Acts 342 (permitting persons on the teaching staff of a university who are knowledgeable in public administration or labor law to be appointed members of the Board so long as they are not actively engaged other than as a member with any labor or employee organization); Pub. L. No. 6, § 30, 1978 Ind. Acts 664; Pub. L. No. 11, § 104, 1981 Ind. Acts 260; Pub. L. No. 16, § 13, 1984 Ind. Acts 235; Pub. L. No. 7, § 93, 1987 Ind. Acts 440; Pub. L. No. 2, § 565, 1988 Ind. Acts 234; Pub. L. No. 1, § 38, 1989 Ind. Acts 24 (directing that the subsection authorizing teaching staff of a university to be members of the board be construed liberally to effectuate the intent of the General Assembly); Pub. L. No. 3, § 118, 1989 Ind. Acts 179 (changing definition of supervisors excluded from the bargaining unit so as to omit the language "[s]upervisors shall include, but not be limited to," presumably thereby restricting the definition of supervisor to those job titles listed in the statute, specifically superintendents, assistant superintendents, business managers and supervisors, directors with school corporation-wide responsibilities, principals and vice principals, and department heads who have responsibility for evaluating teachers).

15. Public Law 105, Section 5, 1992 Ind. Acts 2621.

16. The amendment changes what was previously selection, assignment or promotion of personnel to "hiring, promotion, demotion, transfer, assignment, and retention of certificated employees and changes to any of the requirements set forth in I.C. 20-6.1-4." In addition, it amends Section 6 by limiting a school corporation's management's rights. Specifically, where employers previously were authorized to establish policy, the statute now provides that they may "establish policy through procedures established in sections 4 and 5 of this chapter." IND. CODE § 20-7.5-1-6(b)(2) (1993). Sections 4 and 5 define the scope of bargaining and discussion respectively. In addition, where employers previously were authorized to hire, promote, demote, transfer, assign and retain employees, they now may do so only "through procedures established in sections 4 and 5 of this chapter." IND. CODE § 20-7.5-1-6(b)(3) (1993).

17. See IND. ADMIN. CODE tit. 560, §§ 2-1-1 to -1-9 (1992).

18. See generally ALFRED C. AMAN, JR. & WILLIAM T. MAYTON, ADMINISTRATIVE LAW 434-522 (1993); BERNARD SCHWARTZ, ADMINISTRATIVE LAW 623-713 (1991).

19. IND. CODE §§ 4-21.5-5-1 to -5-16 (1993).

20. *Indiana Educ. Employment Relations Bd. v. Board of Sch. Trustees of Baugo Community Sch.*, 377 N.E.2d 414 (Ind. App. 1978) (upholding a Board decision finding that a teacher was dismissed for union activities contrary to the Act). There has been some debate

However, the courts will intervene if the Board exceeds its statutory authority; if the Board's decision violates constitutional principles; if it is made on unlawful procedure; or if it is arbitrary, capricious or an abuse of discretion.²¹

The courts have held that the Board has jurisdiction over any dispute arising under the Act whether or not it ultimately finds that the employer or exclusive employee representative committed an unfair labor practice.²² Consequently, the Indiana Supreme Court held that the Board had jurisdiction to hear an unfair labor practice complaint regarding a school board's failure to pay annual step increases and salary raises associated with improvements in the employees academic credentials.²³ The court applied a standard analogous to "capable of repetition yet evading review."²⁴

One peculiarity is Indiana's limit on the Board's final order power. In a series of four decisions from 1976 to 1979, the Indiana Court of Appeals held that the Board has no power to issue final orders of reinstatement when a non-tenured teacher has been fired for union activities in violation of Section 7(a) of the Act.²⁵ In *Worthington I*, the court found the Board's decision to fire three teachers for their union activities was supported by substantial evidence. In *Worthington II*, where the trial court affirmed the Board's order reinstating the

regarding the meaning of "any substantial evidence." See Gregory J. Utken, *Administrative Law, Survey of Recent Developments in Indiana Law*, 11 IND. L. REV. 20, 24-25 (1978); Harold Greenberg, *Administrative Law, 1979 Survey of Recent Developments in Indiana Law*, 13 IND. L. REV. 39, 40-41 (1980); and Richard J. Darko, *Labor Law, 1979 Survey of Recent Developments in Indiana Law*, 13 IND. L. REV. 295, 311 (1980). These commentators argue that it represents a one-sided review and is distinct from "substantial evidence on the record as a whole."

21. *Baugo Community Sch.*, 377 N.E.2d at 416.

22. *E.g.*, *Eastbrook Community Sch. Corp. v. Indiana Educ. Employment Relations Bd.*, 446 N.E.2d 1007, 1010 (Ind. Ct. App. 1983).

23. *Indiana Educ. Employment Relations Bd. v. Mill Creek Classroom Teachers Ass'n*, 456 N.E.2d 709 (Ind. 1983) (holding that the statutory requirement that school employers maintain the status quo pending resolution of a bargaining dispute means that the employer must implement previously agreed to salary increases under the hold over contract pursuant to IND. CODE § 20-7.5-1-12(e)). See Edward P. Archer, *1984 Survey of Recent Developments in Indiana Law- Labor Law*, 18 IND. L. REV. 291, 297-98 (1985) for a more complete discussion. See also *Eastbrook Community Sch. Corp. v. Indiana Educ. Employment Relations Bd.*, 446 N.E.2d 1007 (Ind. Ct. App. 1983).

24. *Mill Creek*, 456 N.E.2d at 712 ("The law in Indiana is well settled that although a specific issue may be moot, the fact that it recurs year after year and is of great public interest is sufficient to allow the issue to be considered on its merits.").

25. *Indiana Educ. Employment Relations Bd. v. Board of Sch. Trustees of Worthington-Jefferson Consol. Sch. Corp.*, 355 N.E.2d 269 (Ind. App. 1976) (*Worthington I*); *Board of Sch. Trustees of Worthington-Jefferson Consol. Sch. Corp. v. Indiana Educ. Employment Relations Bd.*, 375 N.E.2d 281 (Ind. App. 1978) (*Worthington II*); *Board of Sch. Trustees of Worthington-Jefferson Consol. Sch. Corp. v. Indiana Educ. Employment Relations Bd.*, 380 N.E.2d 93 (Ind. App. 1978) (*Worthington III*); *State ex rel. Board of Sch. Trustees of Worthington-Jefferson Consol. Sch. Corp. v. Knox Cir. Ct.*, 390 N.E.2d 232 (Ind. App. 1979) (*Worthington IV*). See Richard U. Darko, *Labor Law, 1979 Survey of Recent Developments in Indiana Law*, 13 IND. L. REV. 295 (1980) for a more complete discussion.

teachers, the Court of Appeals held that the Board itself had no authority to order reinstatement of teachers but that the trial court, using its inherent equitable powers, could fashion a remedy to cure whatever injustice had taken place. In *Worthington III*, the Court of Appeals determined that the Act grants no power to the Board to issue final orders of reinstatement for certified school employees with or without back pay, calling into question whether the Board has any final order power to remedy an unfair labor practice.²⁶ In *Worthington IV*, the School Board sought to require the trial court to hold a hearing on the question of reinstatement, so that it could prove the employees would have been fired notwithstanding their union activities. The Indiana Court of Appeals rejected the claim and limited any further hearing to the amount of back pay that might be due in addition to reinstatement.²⁷ Although the Board continues to issue orders to remedy unfair labor practice charges, the *Worthington* cases suggest that the Board has power only to issue interlocutory or temporary orders, but not the power to issue final orders of reinstatement.²⁸

II. BARGAINING UNITS AND ELECTIONS

The Act mandates bargaining between school employers and school employees. A school employee is defined as:

[A]ny full-time certificated person in the employment of the school employer. A school employee shall be considered full-time even though the employee does not work during school vacation periods, and accordingly works less than a full year. There shall be excluded from the meaning of school employee supervisors, confidential employees, employees performing security work and non-certificated employees.²⁹

Supervisors, who are not considered employees under the Act, are defined in essentially the same fashion as provided in the National Labor Relations Act³⁰ as those with authority "to hire, transfer, suspend, lay off, recall, promote, discharge, assign, reward or discipline school employees" or, "direct" them and "adjust their grievances," or "effectively recommend" either of these actions.³¹ Courts have construed this term to exclude school employees who serve as athletic director, head football coach, and head basketball coach.³² One court

26. *Worthington III*, 380 N.E.2d at 95.

27. *Worthington IV*, 390 N.E.2d at 233-34. See Archer, *supra* note 5, at 421 for a more detailed discussion criticizing this result on the basis that it will lead to inconsistency in enforcement.

28. Commentators have criticized this result as inconsistent with the purpose of the Act, and anomalous in view of other labor laws. See Darko, *supra* note 25, at 307-11.

29. IND. CODE § 20-7.5-1-2(e) (1993).

30. 29 U.S.C. §§ 151-169 (1988).

31. IND. CODE § 20-7.5-1-2(h) (1993).

32. See, e.g., *Lawrence Township Educ. Ass'n v. Indiana Educ. Employment Relations*

required that the supervisory employee exercise authority over certificated school employees.³³ The problem with the court's rule is that it leads to somewhat unpredictable results: whether an employee falls within the bargaining unit may change from one year to the next, depending on precisely whom the school board hires to fill coaching positions.³⁴

The better rule would be to examine whether the state or the school corporation requires those supervised to hold a teaching certificate. In *Maconaquah School Corp.*,³⁵ the school board refused to bargain for compensation for a summer pool director although he was licensed to teach and served as the head swimming coach and physical education teacher at the middle school. The court held that if the state or the local school corporation requires a certificate for a particular position, that position falls within the bargaining unit and the school board must bargain compensation.³⁶ Since the position of summer pool director did not require a license or permit, the court excluded it from the bargaining unit and reversed the decision of the Board.³⁷

This rule would produce consistent and predictable results. It would not distort the language of the statute which defines a supervisor as one who acts in that capacity vis a vis "school employees."³⁸ This incorporates the definition of school employee as "any full time certificated person."³⁹ A "certificated employee" is defined as a person whose "contract with the school corporation requires that he hold a license or permit from the state board of education."⁴⁰ The Indiana Supreme Court had an opportunity to consider this issue, but declined to do so.⁴¹

Bd., 536 N.E.2d 563 (Ind. Ct. App. 1989) (holding that the person occupying each of these positions may make effective recommendations concerning hiring, discharge, assignment, transfer and promotion of other coaches).

33. *Id.* at 564.

34. For another case excluding from the teacher bargaining unit as supervisors the head football coach, head basketball coach, and associate athletic director, see *Board of Sch. Trustees of Marion Community Sch. v. Marion Teachers Ass'n*, 530 N.E.2d 309 (Ind. Ct. App. 1988). The court acknowledged the Board's power to hear a bargaining unit clarification petition during the term of an existing contract. The court holds that the inclusion of supervisors within a teacher bargaining unit is an illegal subject of bargaining under the Act. *Id.* at 310-11.

35. *Board of Sch. of Trustees Maconaquah Sch. Corp. v. Indiana Educ. Employment Relations Bd.*, 497 N.E.2d 1084 (Ind. Ct. App. 1986).

36. *Id.* at 1087.

37. *Id.*

38. IND. CODE § 20-7.5-1-2(h) (1993).

39. IND. CODE § 20-7.5-1-2(e) (1993).

40. IND. CODE § 20-7.5-1-2(f) (1993) (emphasis added).

41. See *Board of Sch. Trustees of Sch. Town of Speedway v. Indiana Educ. Employment Relations Bd.*, 510 N.E.2d 162 (Ind. 1987) (Chief Justice Shepard, dissenting from denial of transfer); and *Board of Sch. Trustees of the Sch. Town of Speedway v. Indiana Educ. Employment Relations Bd.*, 498 N.E.2d 1006, 1007 (Ind. Ct. App. 1986) (holding that the positions of football statistician, guidance coordinator, and computer coordinator were excluded by a contract providing that the unit include personnel who have "no administrative or supervisory responsibili-

A 1989 statutory amendment presumably answered the narrow question of whether a head coach is excluded from the bargaining unit.⁴² The amendment altered the definition of supervisors by deleting the language "[s]upervisors shall include, but not be limited to" and replacing it with "[t]he term includes." The statute lists the specific job titles excluded as superintendents, assistant superintendents, business managers and supervisors, directors with school corporation-wide responsibilities, principals and vice principals, and department heads who have responsibility for evaluating teachers.⁴³ If courts apply the latin maxim of statutory construction *expressio unius exclusio alterius est*, they will include head football and basketball coaches in teacher bargaining units, while excluding the school-wide athletic director. However, the amendment does not address the problematic question of how to determine supervision.

The courts have upheld the Board's broad reading of the term "school employer" in the Act. A special services unit qualified although it provided special education services to six school corporations and two state hospitals.⁴⁴ In addition, a joint Indiana-Ohio school district formed to operate an elementary school at the border qualified as a school employer.⁴⁵ Similarly, the courts have held that the term "school employee organization" includes one local union that represents bargaining units from three different school corporations.⁴⁶

The courts have deferred to the Board in its expertise as an administrative agency charged with conducting representation elections. In one case, the court refused to review a Board order directing a third runoff election between rival Association and Federation contenders.⁴⁷ The courts have reversed the Board where it attempted to direct an election without regard to an election contract that predated the Act.⁴⁸

ties," and holding that school board had no obligation to file petition for unit determination as to these three positions).

42. Pub. L. No. 3, § 118, 1989 Ind. Acts 180.

43. IND. CODE § 20-7.5-1-2(h) (1993).

44. Madison Area Educ. Special Serv. Unit v. Indiana Educ. Employment Relations Bd., 483 N.E.2d 1083 (Ind. Ct. App. 1985).

45. Union County Sch. Corp. Bd. of Sch. Trustees v. Indiana Educ. Employment Relations Bd., 471 N.E.2d 1191 (Ind. Ct. App. 1984).

46. Northwest Ind. Educ. Ass'n v. School City of Hobart, 503 N.E.2d 920 (Ind. Ct. App. 1987) (the question of whether a multi-employer bargaining unit would be certified under the Act was not at issue).

47. Scott County Fed'n of Teachers v. Scott County Sch. Dist., 496 N.E.2d 610 (Ind. Ct. App. 1986) (holding that an order directing a third election was not a final order for purposes of the State Administrative Adjudication Act and that a departure from exhaustion requirement was not warranted in the absence of irreparable harm). In *Scott*, the court was called on to resolve a conflict between a Board regulation providing for a runoff election between the two highest vote getters and a statutory requirement that the election ballot must include the choice "No Representative." In two previous runoff elections among three choices (Association, Federation, and No Representative), no option received a majority of the votes. In the order contested here, the Board deleted the option "No Representative" from the ballot for the third runoff election.

48. South Bend Fed'n of Teachers v. National Educ. Ass'n—South Bend, 389 N.E.2d 23

The Board's regulations permit it to determine the appropriate bargaining unit in the absence of an agreement between the parties.⁴⁹ A majority of all the employees in the appropriate unit must vote in favor of representation; no school organization will be certified merely as the result of a majority vote of those present and voting.⁵⁰

III. THE SCOPE OF BARGAINING UNDER THE ACT

Indiana has a unique approach to the scope of teacher bargaining. Ordinarily, an employer and employee union will bargain over mandatory subjects of bargaining, characterized in the private sector as "rates of pay, wages, hours of employment, or other conditions of employment."⁵¹ A mandatory subject of bargaining is one over which the employer must bargain or risk liability in an unfair labor practice proceeding.⁵² Any agreement on a mandatory subject of bargaining may be reduced to contract language, and the subsequent contract will be enforceable. Permissive subjects of bargaining are those subjects over which an employer may choose to bargain but has no statutory obligation to do so.⁵³ An employer may refuse to even discuss a non-mandatory or permissive subject of bargaining and its refusal will not result in unfair labor practice liability. However, if the employer agrees to discuss a permissive subject and reaches agreement on a contract provision regarding that subject, the contract will be fully enforceable and a proper subject for grievance arbitration.⁵⁴ The final category is the illegal

(Ind. App. 1979) (holding that a Board order unconstitutionally impaired the contractual rights of the exclusive bargaining representative under an election agreement dating back to 1972). In *South Bend*, the court also held that a Board hearing examiner report may have res judicata effect, and may collaterally estop a future case on the same issue before the Board. The court did not require the NEA-South Bend to exhaust administrative remedies before the Board because the Association might suffer irreparable harm. See Harold Greenberg, *Administrative Law, 1980 Survey of Recent Developments in Indiana Law*, 14 IND. L. REV. 65, 75 (1981) for a more complete discussion.

49. IND. CODE § 20-7.5-1-10(a)(2) (1993). This section also provides that the Board shall consider, but not be limited to considering "(i) efficient administration of school operations; (ii) the existence of a community of interest among school employees; (iii) the effects on the school corporation and school employees of fragmentation of units; and (iv) recommendations of the parties involved." A teacher bargaining unit that is less than a wall-to-wall school corporation unit is virtually unheard of. Thus, the statutory criteria appear to be superfluous. They have more application to a general public employee bargaining statute.

50. For the Board's regulations on election proceedings see IND. ADMIN. CODE tit. 560, § 2-1-1 to -6-9 (1992). The procedure is substantially the same as that provided in the NLRA and other public employee bargaining laws. H.T. EDWARDS ET AL., *LABOR RELATIONS LAW IN THE PUBLIC SECTOR* 160-253 (3d ed. 1985).

51. National Labor Relations Act, 29 U.S.C.A. § 159 (1988).

52. *Developments in the Law—Public Employment*, 97 HARV. L. REV. 1611, 1684-87 (1984) [hereinafter *Harvard Note*].

53. See generally 1 THE DEVELOPING LABOR LAW 851-954 (Patrick Hardin et al. eds., 3d ed. 1992).

54. *Harvard Note*, supra note 52, at 1685.

subject of bargaining. Either for reasons of public policy or based upon other law, certain subjects are removed entirely from the scope of allowable bargaining. If the parties agree to a contract provision incorporating an illegal subject of bargaining, a reviewing court may declare that provision void and unenforceable.⁵⁵

Indiana does not follow this traditional pattern. Instead, it has established three categories: mandatory subjects of bargaining, mandatory subjects of discussion, and illegal subjects of bargaining. There is no purely permissive category of bargaining subjects. In general terms, section 4 of the Act specifies that "salary, wages, hours, and salary and wage-related fringe benefits" are mandatory subjects of bargaining.⁵⁶ The term "bargain collectively" is defined as "the performance of the mutual obligation of the school employer and the exclusive representative to meet at reasonable times to negotiate in good faith with respect to items enumerated in section 4 of this chapter and to execute a written contract incorporating any agreement relating to such matters."⁵⁷ The duty to bargain does not require that either party agree to a proposal or make a concession. Moreover, it does not require that the parties ratify a contract, but contracts are binding only if properly ratified.⁵⁸

Section 5 defines subjects of discussion as "[w]orking conditions, other than those provided in section 4 . . . [c]urriculum development and revision, [t]extbook selection, [t]eaching methods, [h]iring, promotion, demotion, transfer, assignment, and retention of certificated employees, and changes to any of the requirements set forth in I.C. 20-6.1-4, [s]tudent discipline, [e]xpulsion or supervision of students, [p]upil-teacher ratio, [c]lass size or budget appropriations."⁵⁹

Section 6(b) describes the areas of management prerogative which are not bargainable:

School employers shall have the responsibility and authority to manage and direct in behalf of the public the operations and activities of the school corporation to the full extent authorized by law. Such responsibility and activity shall include but not be limited to the right of the school employer to:

- (1) direct the work of its employees;
- (2) establish policy through procedures established in sections 4 and 5 of this chapter;

55. *Id.*

56. IND. CODE § 20-7.5-1-4 (1993).

57. IND. CODE § 20-7.5-1-2(n) (1993).

58. *Id.*

59. IND. CODE § 20-7.5-1-5(a) (1993) as amended by Ind. Pub. L. 105-1992 (effective July 1, 1992). Prior to this amendment, exclusive representatives could discuss "selection, assignment, or promotion of personnel" instead of "hiring, promotion, demotion, transfer, assignment, and retention of certificated employees."

- (3) hire, promote, demote, transfer, assign, and retain employees through procedures established in sections 4 and 5 of this chapter;
- (4) suspend or discharge its employees in accordance with applicable law through procedures established in sections 4 and 5 of this chapter;
- (5) maintain the efficiency of school operations;
- (6) relieve its employees from duties because of lack of work or other legitimate reason through procedures established in sections 4 and 5 of this chapter; and
- (7) take actions necessary to carry out the mission of the public schools as provided by law.⁶⁰

While the substance of certain decisions is reserved to management, the procedures through which management effectuates the decisions are subject to either negotiation or discussion.

A. *The Grandfather Clause*

The line between subjects of bargaining and subjects of discussion is blurred by a provision in section 5 which grandfathers certain agreements between teachers and school corporations predating the Act: “[A]ny items included in the 1972-1973 agreements between any employer school corporation and the employee organization shall continue to be bargainable.”⁶¹ The courts have had an opportunity to consider the argument that this grandfather clause applies only to those topics of bargaining listed in section 5 as mandatory subjects of discussion.⁶² In *Northwestern School Corp.*, the employer argued that the school calendar was not a mandatory subject of bargaining because it was a matter committed to school corporation discretion under section 6 of the Act.⁶³ It argued that the court should apply the *ejusdem generis* doctrine.⁶⁴ The court refused, and instead decided that the grandfather clause could apply to “any items,”⁶⁵ in accordance with the plain, ordinary meaning of the term.

60. IND. CODE § 20-7.5-1-6(b) (1993).

61. IND. CODE § 20-7.5-1-5(a) (1993).

62. *Northwestern Sch. Corp. of Henry County Bd. of Sch. Trustees v. Indiana Educ. Employment Relations Bd.*, 529 N.E.2d 847 (Ind. Ct. App. 1988), *trans. denied*, Jan. 9, 1989.

63. *Id.* at 852; *See Eastbrook Community Sch. Corp. v. Indiana Educ. Employment Relations Bd.*, 446 N.E.2d 1007 (Ind. Ct. App. 1983) (holding that the school calendar is a matter of educational policy and is a non-negotiable, managerial decision).

64. Using this canon of statutory construction, a general term at the end of a more specific statutory list is construed to refer to only things of like kind or category in the specific list.

65. *Northwestern*, 529 N.E.2d at 851. However, citing *Eastbrook*, the court also determined that certain calendar items would not be negotiable in deference to the fact that “the calendar’s effect on students and other public interests outweighed the private interests of

Moreover, the court determined that for purposes of the grandfather clause, the word "agreement" did not necessarily mean a formal written contract. Instead, the court again used the plain language rule of statutory construction to hold that an agreement does not have to be in writing.⁶⁶ An exclusive representative need only prove a meeting of the minds of two parties and mutual intent regarding their respective rights and duties. The court held that under the law of contracts, the trier of fact must determine from all the circumstances whether an agreement came into being.⁶⁷

This decision casts a considerable cloud over the geography of bargaining in Indiana. The question that it leaves open is whether an illegal subject of bargaining may become a mandatory subject of bargaining under the grandfather clause. For example, in *Eastbrook*, the court appeared to hold that the school calendar was an illegal subject of bargaining; it concluded that the school calendar falls exclusively within a school corporation's managerial prerogative under section 6(b), a prerogative that the school corporation may not bargain away under section 1(d)(iii) of the Act.⁶⁸ As the law now stands, the grandfather clause is not limited to subjects of discussion. Instead, it may grandfather bargaining subjects that would otherwise be entirely committed to school corporation discretion under section 6.⁶⁹ The Indiana Supreme Court has not given the lower courts any guidance in this area.

This reading essentially negates a portion of the language of section 3 of the Act: "No contract may include provisions in conflict with (a) any right or benefit established by federal or state law, . . . or (c) school employer rights as defined in section 6(b) of this chapter."⁷⁰ In addition, it ignores the declaration of legislative intent providing that "the Indiana General Assembly has delegated the discretion to carry out this changing and innovative educational function to the local governing bodies of school corporations, composed of citizens elected or appointed under applicable law, a delegation which these bodies may not and should not bargain away."⁷¹ One of the classic rules of statutory construction is that the court should read all the provisions of an act together and not read one so as to render meaningless or ineffective another.⁷² Had the legislature intended the grandfather clause to apply to all subjects of bargaining, regardless

teachers." *Id.* at 852.

66. *Id.* at 851.

67. *Id.*

68. *Eastbrook Community Sch. Corp. v. Indiana Educ. Employment Relations Bd.*, 446 N.E.2d 1007, 1012 (Ind. Ct. App. 1983).

69. *Cf. Board of School Trustees of the Gary Community Sch. Corp. v. Indiana Educ. Employment Relations Bd.*, 543 N.E.2d 662, 668 (Ind. Ct. App. 1989) (observing that grandfather clause applies only to those items which do not infringe on exclusive managerial prerogative of school board).

70. IND. CODE § 20-7.5-1-3 (1993).

71. IND. CODE § 20-7.5-1-1(d)(iii) (1993).

72. *E.g., Dague v. Piper Aircraft Corp.*, 418 N.E.2d 207 (Ind. 1981).

of whether they are discussable or matters of management prerogative, the logical place in the statute to put the grandfather clause would have been in section 3, not section 5 of the Act.

B. Contracts that Create a Deficit

Another restriction on the scope of bargaining is Indiana's provision invalidating contracts that create a deficit.⁷³ The Act defines "deficit financing" as "expenditures in excess of money legally available to the employer."⁷⁴ One court had an opportunity to interpret this section and held that to carry its burden of proof, a school corporation had to demonstrate precisely where it implemented budget cuts.⁷⁵ A bald statement that the school corporation made all feasible budget cuts was inadequate. Teacher salaries are part of the general fund, which includes such items as equipment, maintenance, and extra-curricular activities. The school corporation had the burden of proving that the teachers' contracts themselves were the expense within the general fund which created the deficit.⁷⁶ The court rejected the exclusive representative's contention that the statute may not impair previously existing legal contracts after rights have vested, reasoning that the parties do not have an inviolable right to enter a multi-year contract, just as they have no right to enter into an illegal contract.⁷⁷

Essentially, the Court of Appeals set up a procedure that is analogous to the private sector treatment of an employer's bankruptcy. Under the National Labor Relations Act, an employer may seek relief from collective bargaining agreements in bankruptcy if it proves that it is financially unable to bear the expense and the union refuses to modify the contract.⁷⁸ In other states, a school

73. IND. CODE § 20-7.5-1-3 (1993), providing "[i]t shall be unlawful for a school employer to enter into any agreement that would place such employer in a position of deficit financing as defined in this chapter, and any contract which provides for deficit financing shall be void to that extent and any individual teacher's contract executed in accordance with such contract shall be void to such extent."

74. IND. CODE § 20-7.5-1-2(q) (1993).

75. *South Bend Community Sch. Corp. v. National Educ. Ass'n - South Bend*, 444 N.E.2d 348 (Ind. Ct. App. 1983) (citing with approval *Philadelphia Fed'n of Teachers v. Thomas*, 436 A.2d 1228 (Pa. Commw. Ct. 1981) (holding that Pennsylvania's statute requires school boards to operate with a balanced budget, and, therefore, a collective bargaining agreement that purported to have a two year term but caused a deficit in the second year represented a severable contract with each year subject to a condition precedent, that is, that the funding of the contract by independent legislative bodies, over which neither party had any actual control, would be forthcoming). See Edward P. Archer, *Labor Law, 1983 Survey of Recent Developments in Indiana Law*, 17 IND. L. REV. 245, 252-53 (1984).

76. *South Bend*, 444 N.E.2d at 352.

77. *Id.* at 353.

78. *In re American Provision Co.*, 44 B.R. 907 (Bankr. D. Minn. 1984) (holding that the employer or debtor-in-possession must make specific proposals to modify the contract; must meet with the union at reasonable times to bargain in good faith; the union must have refused to accept the proposals without good cause; and the balance of the equities must clearly favor rejection of

district that enters into a collective bargaining agreement that covers more than one fiscal year assumes the obligation of seeking the funding to implement the contract. If there is a budget shortfall, the school employer must make up the missing funds through teacher layoffs, support staff layoffs, elimination of non-mandatory educational programs such as extra-curricular activities, or similar budget cuts.⁷⁹ On occasion, a school board will take the extreme step of closing school before the statutory minimum number of student school days, thereby forcing the state to take the school board to court.⁸⁰ A court order reopening school then justifies a new budget referendum. *South Bend* is the only significant decision interpreting this provision of the Act.⁸¹

C. Contract Provisions in Conflict with State or Federal Law

Section 3 of the Act creates a final category of contract clause that may be voidable. It provides that "[n]o contract may include provisions in conflict with (a) any right or benefit established by federal or state law."⁸² An early Indiana case, *Weest v. Board of School Commissioners of the City of Indianapolis*,⁸³ concerns a contract provision negotiated before the effective date of the Act. However, the court cites the Act in dicta and examines whether the contract provision in question actually conflicts with the Indiana General School Powers Act.⁸⁴ An individual teacher argued that her contribution of one of her statutorily guaranteed sick leave days to a sick leave bank for other teachers was contrary to state law. The bank would extend sick leave to teachers who had exhausted their own accumulation. The court rejected this argument and reconciled the sick bank provision with the statute. The court found no actual conflict because the Association would pay teachers who need one additional day after they have exhausted all their sick leave after the sick leave bank was empty.⁸⁵

the collective bargaining agreement). See generally 2 THE DEVELOPING LABOR LAW 1756-71 (Patrick Hardin et al. eds., 3d ed. 1992).

79. See generally Annotation, *Right to Dismiss Public School Teacher on Ground That Services Are No Longer Needed*, 100 A.L.R.2d 1141 (1989).

80. E.g., *Butt v. State*, 842 P.2d 1240 (Cal. 1992).

81. In *Eastbrook Community Sch. Corp. v. Indiana Educ. Employment Relations Bd.*, 450 N.E.2d 1006 (Ind. Ct. App. 1983), the court deleted from its decision any reference to the question of deficit financing. The court had in dicta observed that it could not compel the school board to bargain with the Association for the purpose of reaching an agreement that might place the employer in a position of deficit financing.

82. IND. CODE § 20-7.5-1-3 (1993).

83. 320 N.E.2d 748 (Ind. App. 1974).

84. IND. CODE § 20-5-1 to -5-6 (1993).

85. But see *Gary Teachers Union v. School City of Gary*, 332 N.E.2d 256 (Ind. App. 1975) (collective bargaining may not reduce statutory minimum period for achieving tenure) and commentary criticizing this decision in Edward P. Archer, *Labor Law, Survey of Recent Developments in Indiana Law*, 10 IND. L. REV. 257, 265 (1976). One may reconcile the *Gary* and *Weest* decisions. The courts will accommodate bargaining to existing statutes whether these protect

Similarly, in school calendar cases, the courts have attempted to reconcile statutory provisions with collective bargaining.⁸⁶ A statute on a subject which is also bargainable or discussable does not automatically preclude bargaining or discussion. Instead, the parties' final contract is voidable if it reduces a minimum guaranteed statutory benefit or is contrary to some obligation or authority committed to school corporation discretion.

D. The Scope of Bargaining and Impasse Procedures

The last general issue on the scope of bargaining that courts have considered is procedural: how do the parties resolve a dispute over whether an item is mandatory in the context of dispute resolution procedures such as mediation and fact finding? In *Blackford County School v. Indiana Education Employment Relations Board*,⁸⁷ the court held that a party could insist on a non-mandatory subject of bargaining to fact finding. A party may present evidence to the fact finder regarding a disputed subject of bargaining for a determination of whether the issue is mandatory or discussable under the Act.⁸⁸ If the fact finder rules on a non-mandatory or discussable subject, a court may overturn the fact finder's award.⁸⁹ In addition, the school corporation may file an unfair labor practice against the exclusive representative after the fact finding. The court and the Board appear to rely on the consensual nature of fact finding and mediation to protect a school corporation's prerogatives under the Act. As a practical matter, a fact finder's report is not binding if rejected in a timely fashion.⁹⁰ Thus, the school employer is at little risk from an award on a discussable subject. The

teachers or other interest groups, such as school boards or the public. The tenure law balances competing interests, and protects teachers as well as school districts and the public. Allowing parties to bargain over the tenure period would deprive the public of the benefit of observing a teacher's performance over an extended period of time.

86. See *infra* notes 108-32 and accompanying text.

87. *Blackford County Sch. v. Indiana Educ. Employment Relations Bd.*, 519 N.E.2d 169 (Ind. Ct. App. 1988).

88. *Id.* at 174.

89. Cf. *North Miami Community Corp. v. North Miami Educ. Ass'n*, 500 N.E.2d 1288 (1986) (unpublished decision holding parties may agree to binding fact finding over discussable subjects).

90. In *Blackford*, the employer argued that it incurred significant costs presenting evidence on such items. This is not irreparable harm. However, the remedy available at the Board after a fact finder's report has been issued does not seem adequate to prevent the recurrence of the conduct. Typically, the Board could order that party to cease and desist from the unfair labor practice. It is an open question whether the Board may order a party to pay money damages. Moreover, even if the Board were to order money damages, it is not clear this would provide an adequate deterrent. Lastly, the Board's regulations provide that a party may obtain review of a fact finding report only by filing a request within two days after receipt of the report. The request may be oral or in writing and must state the nature of the objection. The Board may nevertheless refuse to review the fact finder's report or make additional findings and recommendations. The Board is obligated to act within ten days of receipt of the fact finder's report. IND. ADMIN. CODE tit. 560, § 2-4-6 (1992).

general practice at the bargaining table appears to be open scope bargaining under a reservation of the right to exclude the subject at a later time.⁹¹

However, this practical approach seems to conflict with the language of the Act. The Act provides: "A school employer shall discuss with the exclusive representative of certificated employees, and may but shall not be required to bargain collectively, negotiate, or enter into a written contract concerning or be subject to or enter into impasse procedures on the following matters"⁹² In *Blackford*, the school corporation argued that presenting evidence to a fact finder regarding a disputed subject of bargaining violated this provision of the Act. The court disagreed and ruled that, while the fact finder may not render an award on a prohibited subject, she had the power and jurisdiction to hear evidence on a prohibited subject under the liberal rules of evidence for informal administrative proceedings.⁹³

The court tacitly approves of delegating to fact finders the duty to determine the scope of bargaining. The Board has directed fact finders to accept documents, hear arguments, and consider briefs concerning whether or not the fact finder has jurisdiction on the items on dispute. The Board will direct the fact finder to make an initial determination on whether subjects of bargaining which would otherwise be discussable are grandfathered as bargainable under the Act's grandfather clause. However, the Act uses unusual language in excluding discussable items from impasse procedures. The employer "shall not be required to bargain collectively . . . or be subject to or enter into impasse procedures"⁹⁴ on the subjects. The plain language of the Act appears to bar *any* consideration by the fact finder of a non-mandatory or discussable subject. In *Blackford*, the Board did offer the parties a bifurcated hearing before the fact finder, first on discussable subjects, then on the merits.⁹⁵ The parties rejected it. Another alternative would be an expedited hearing before a different Board agent on the scope of bargaining. The Board has rejected this alternative. However, if Indiana adopts binding interest arbitration, this issue may warrant reexamination. In other states, courts have enjoined impasse resolution procedures over non-mandatory subjects of bargaining.⁹⁶ In the private sector, the NLRB has held

91. This assertion is based on anecdotal evidence gathered in discussions with representatives of the Board and experienced mediators on the Board's ad hoc panel of mediators and fact finders.

92. IND. CODE § 20-7.5-1-5(a) (1993).

93. *Blackford County Sch. v. Indiana Educ. Employment Relations Bd.*, 519 N.E.2d 169, 174 (Ind. Ct. App. 1988).

94. IND. CODE § 20-7.5-1-5(a) (1993).

95. Telephone Interview with Donald Russell, Executive Director, IEERB (Mar. 1994).

96. *E.g.*, *Dunellen Bd. of Educ. v. Dunellen Educ. Ass'n*, 72 CCH Lab. Cases p. 53119 (N.J. Super. 1973), and *see generally* James D. Lawlor, Annotation, *Validity and Construction of Statutes or Ordinances Providing for Arbitration of Labor Disputes Involving Public Employees*, 68 A.L.R.3d 885 (1976).

that it is an unfair labor practice to insist to impasse upon a nonmandatory subject.⁹⁷

IV. SCHOOL CALENDAR

In Indiana teacher bargaining, the most litigated bargaining subject is the school calendar.⁹⁸ The Act's language creates the problem by providing in Section 4 that teacher hours are a mandatory subject of bargaining, while Section 5 makes working conditions other than those listed in Section 4 mandatory subjects of discussion but does not specifically refer to the student school day or the student or teacher school year. In addition, Section 6 gives school employers the responsibility and authority to manage the schools to the full extent authorized by law but does not refer to the student school year, student school day, or school calendar. Instead, it gives the school employers the right to "establish policy,"⁹⁹ and to "take actions necessary to carry out the mission of the public schools as provided by law"¹⁰⁰ through "procedures established in sections 4 and 5 of this chapter."¹⁰¹

Thus, in the early days of the Act, teachers contended that the school calendar and school year represented teacher hours and were mandatory subjects of bargaining. On the other hand, school corporations contended that they were matters of school or educational policy and not bargainable. They also cited the intention of the Indiana General Assembly¹⁰² and section 3 of the Act which provided that "[n]o contract may include provisions in conflict with (a) any right or benefit established by federal or state law."¹⁰³ As is the case with most states, Indiana statutorily defines the minimum mandatory school term as nine months.¹⁰⁴ The student instructional day is defined as a minimum of five hours of instructional time in grades one through six and six hours of instructional time in grades seven through twelve.¹⁰⁵ In addition, the school corporation must conduct at least 180 student instructional days.¹⁰⁶ Indiana also requires that the

97. *E.g.*, *NLRB v. Wooster Div. of Borg-Warner Corp.*, 356 U.S. 342 (1958) and *see generally* HARDIN, *supra* note 53, at 604-07.

98. Indiana is not alone in this. *See* Deborah Tussey, Annotation, *Bargainable or Negotiable Issues in State Public Employment Labor Relations*, 84 A.L.R.3d 242, 306-09 (1978).

99. IND. CODE §§ 20-7.5-1-6(b)(2) & -6(b)(7) (1993).

100. IND. CODE § 20-7.5-1-6(b)(7) (1993).

101. IND. CODE § 20-7.5-1-6(b)(2), (3), (4), (6) (1993).

102. The preamble to the Act provides that the legislature "delegated the discretion to carry out this changing and innovative educational function to the local governing bodies of the school corporations, composed of citizens elected or appointed under applicable law, and a delegation which these bodies may not and should not bargain away." IND. CODE § 20-7.5-1-1(d)(iii) (1993).

103. IND. CODE § 20-7.5-1-3 (1993).

104. IND. CODE § 20-10.1-2-2 (1993).

105. IND. CODE § 20-10.1-2-1(b) (1993).

106. IND. CODE § 20-10.1-2-1(c) (1993). If the school corporation fails to conduct the

school corporation include the school term in each individual teacher contract.¹⁰⁷

None of these provisions dictates the precise date upon which school must start or end. Moreover, before the Act's passage there was broad variation in practice across the state on whether the school corporation and teacher exclusive representative discussed or bargained school calendar. Predictably, the tangle of statutes and the grandfather clause gave rise to a series of disputes when teachers sought to bargain both pay and work schedules in response to school closings in weather emergencies. The earliest reported case involved the Monroe County Community School Corporation.¹⁰⁸ It arose when the corporation unilaterally delayed the starting date of school after negotiating the collective bargaining agreement and then prorated teachers' salaries based upon the reduced number of work days in the calendar year. Teachers brought suit to recover the lost pay and prevailed. The school board counterclaimed for alleged overpayments from previous school years where teachers had worked more than 180 school days and been paid accordingly. The court denied the counterclaim. It did not address the unfair labor practice question arising out of the unilateral change in the calendar.

That issue was squarely presented in *Eastbrook Community Schools Corp. v. Indiana Education Employment Relations Board*.¹⁰⁹ In *Eastbrook*, the Board had concluded that the school corporation committed an unfair labor practice when it refused to bargain over the school calendar. The school corporation's provision ensuring that teachers would not be required to work in excess of 177 days was inconsistent with the individual teacher contracts wherein teachers agreed to teach for 180 days within the 1978-79 school year. The Association demanded to bargain and the Board held that the number of teacher days, make up days, and the pay for such days are all mandatory bargainable items under Section 4 of the Act.¹¹⁰

On appeal, the court held that the provision's language did not change the total number of teacher hours or work days. It also held the school corporation had no duty to bargain over the scheduling of days because the subject falls

requisite number of student instructional days, it will lose its state funding by a proportional amount. IND. CODE § 20-10.1-2-1(d) (1993).

107. IND. CODE § 20-6.1-4-3 (1993). The contract must contain the "(A) the beginning date of the school term as determined annually by the school corporation; (B) the number of days in the school term as determined annually by the school corporation; (C) the total salary to be paid during the school year; and (D) the number of salary payments to be made during the school year."

108. *Monroe County Community Sch. Corp. v. Frohlinger*, 434 N.E.2d 93 (Ind. Ct. App. 1982).

109. 446 N.E.2d 1007 (Ind. Ct. App. 1983). See Janet L. Land, *Teacher Collective Bargaining*, 19 IND. L. REV. 235 (1986), and Archer, *supra* note 75, at 251-52 for additional discussion.

110. *Eastbrook*, 446 N.E.2d at 1007.

exclusively within a school corporation's managerial prerogative under Section 6(b)¹¹¹ and Section 1(d)(iii)¹¹² prohibits the school corporation from bargaining this away. The court construed the statute prescribing contents of an individual teacher contract as granting to a school board the discretion and authority to determine the beginning date of the school term and, for those days beyond the statutory minimum, to determine the number of days in the school term. The minimum number of school days was neither discussable nor negotiable.¹¹³ The court implied the power to determine the ending date of school from the school corporation's exclusive authority to decide both the actual number of days and the starting date of school. Although the court concluded that the disputed clause did not have a direct and substantial impact upon "salary, wages, hours and salary and wage related benefits," it acknowledged that it did have an impact on "working conditions" and, thus, would be subject to mandatory discussion.¹¹⁴

The court considered an employer's duty to discuss the school calendar in *Union County School Corporation Board of School Trustees v. Indiana Education Employment Relations Board*.¹¹⁵ The school corporation had a practice of paying teachers extra compensation and issuing supplemental contracts for make up days. In 1976-77, the school corporation closed school for eighteen days due to inclement weather and paid teachers for each of these days plus three make up days. During the 1977-78 school year, it closed school for nineteen days, required teachers to make up seven of these days, but paid them no extra compensation. The Association did not then demand either to bargain the change in past practice or to discuss it. Moreover, the court never directly addressed the issue of whether this failure to demand bargaining or discussion represented a waiver.

In December of the 1978-79 school year, the school board adopted a policy that one elementary school would remain open as long as Ohio school buses were running. This meant that teachers at this school (operated jointly with an Ohio school corporation) worked six days during which the rest of the Union County Schools were closed. The Association filed an unfair labor practice complaint alleging that the school corporation unilaterally changed pay procedures for make up days. The Board held that the school corporation had failed to bargain or discuss the scheduling of make up days and its school closing plan. The Board ordered it to cease and desist and to pay teachers supplemental wages.¹¹⁶

111. IND. CODE § 20-7.5-1-6(b) (1993).

112. IND. CODE § 20-7.5-1-1(d)(iii) (1993).

113. *Eastbrook*, 446 N.E.2d at 1012.

114. *Id.* at 1013-14.

115. 471 N.E.2d 1191 (Ind. Ct. App. 1984).

116. *Id.* at 1195.

Citing *Eastbrook*, the court held that scheduling make up days which do not affect the total number of hours or days that teachers teach is a subject within the managerial prerogative of the school board under Section 6(b) of the Act.¹¹⁷ Since teachers contracted to teach 182 days, and scheduling did not affect the number of days or hours but only the timing of these days, there was no violation of the duty to bargain in good faith. On the past practice concerning supplemental contracts and additional wages for make up days, the court held there was no unilateral change in a mandatory subject of bargaining. The court did not distinguish between payment under a past practice and scheduling. It dismissed the past practice charge on the theory that scheduling the school calendar is an illegal subject of bargaining.¹¹⁸

Another way to handle the school calendar issue is to distinguish between the managerial prerogative to reschedule emergency days and its impact upon wages and conditions of employment.¹¹⁹ Where teachers have agreed upon an annual salary in exchange for a specific number of school days, as long as rescheduling does not affect the total number of school days worked, there is no impact on wages or bargainable conditions of employment. However, a distinct analytical question is presented where the employer has conferred an economic benefit by past practice. A past practice of paying wages is independently a mandatory subject of bargaining. This is true even where the employer voluntarily instituted the past practice and was not obligated to pay the funds.¹²⁰ The court did not distinguish between the initial obligation to pay as a matter of law and the creation of a past practice.¹²¹

117. *Id.* at 1196-97.

118. "Relevant to our decision that school officials *are not allowed to bargain away* their duty to determine the school calendar is the following If the Union Elementary School Employers' past practice of paying Union Elementary teachers extra for make up days is allowed to make this a mandatory bargainable subject, it may greatly inhibit the Joint Board in its scheduling of the school calendar. This could adversely affect the other non-teaching interests referred to in the *Eastbrook* opinion. Consequently we hold that the school Employers' past practice of paying the teachers extra did not elevate the subject of make up days to mandatory bargainable status." *Id.* at 1197-98 (emphasis added).

119. See generally Tussey, *supra* note 98, at 306-09.

120. The traditional example from the private sector is the Christmas ham or turkey. An employer has no obligation under wage and hour laws to provide employees either with a Christmas bonus or with some tangible benefit in lieu of a cash bonus during the holidays. However, once an employer voluntarily undertakes to confer this benefit and does so as a matter of established and consistent past practice, the employer may not alter the practice without bargaining. See HARDIN, *supra* note 53, at 864-67.

121. The outcome on a traditional analysis would not necessarily change. Specifically, the court fails to address the question of waiver. Under traditional doctrine, upon receiving notice that an employer has changed or intends to change a past practice, the exclusive bargaining representative has a legal obligation to demand bargaining. Its failure to make a timely specific demand to bargain may later estop the union from complaining about the change in practice. See HARDIN, *supra* note 53, at 708-10. In *Union*, it appears that the employer failed to or refused to pay additional compensation during the 1977-78 school year. The union did not make a timely

More peculiar is how the court then handled the duty to discuss under Section 5 of the Act. The court agreed with the Board that scheduling make up days and the school closing plan represented working conditions which were mandatory subjects of discussion. Relying on the statutory definition of "discuss" as "the performance of the mutual obligation of the school corporation through its superintendent and the exclusive representative to meet at reasonable times,"¹²² the court held that the employer had an obligation to initiate discussion in 1977-78 when it changed its past practice of paying supplemental wages. The court appeared to impose the obligation to initiate on the party who has the most information. Because the employer was aware of the change in pay, it had the duty to initiate discussion. Since discussion is analogous to bargaining, one would expect the duty to arise only in response to a request.¹²³ The court also concluded that the Association, *not* the school corporation, had the duty to initiate discussion on the school closing plan for the 1978-79 school year, since teachers were aware that the past practice had been changed. The court concluded, "[a]ny other rule, such as one requiring school boards to discuss, prior to adoption, any policy affecting 'working conditions' is manifestly unworkable in a school situation."¹²⁴ This shifting duty to initiate discussion is equally unworkable.

In 1987, the Indiana Legislature amended the school closing statute presumably in response to the school calendar litigation.¹²⁵ In two cases,

demand to bargain, and in fact did not protest until April 1979, ten months after the school corporation had changed its past practice of paying supplemental wages. In the absence of any evidence that the parties were discussing this dispute on a continuous basis, the usual outcome would be a holding that the union had waived its right to bargain.

122. IND. CODE § 20-7.5-1-2(o) (1993).

123. The court could have used the more traditional notions of notice and waiver. Specifically, instead of placing the burden to initiate discussion on employers because the employer had the information regarding the change in paying supplemental wages, under the traditional approach a court would look to whether the teacher union as exclusive representative was on notice that the employer had changed its practice. For example, if individual teachers did not receive supplemental wages in 1977-78, but the union was not made aware of this change in past practice, there is no waiver, and the union may demand bargaining and, by analogy, discussion when it becomes aware of the change. In terms of imputing knowledge or notice of the change, courts or labor agencies will examine whether an individual teacher who did not receive pay was, for example, an officer in the union or a union steward.

124. *Id.* at 1199. For a decision regarding the Association's request for discussion, see *Tippecanoe Educ. Ass'n & Board of Sch. Trustees of the Tippecanoe Sch. Corp.*, 1990 Ind. Ed. Emp. Rel. Bd. Ann. Rep. 69 (1990).

125. Ind. Pub. L. 390-1987, § 7, amending IND. CODE § 20-6.1-5-9(a). The statute as amended provides "If during the term of the teacher's contract: (1) the school is closed by the order of the: (A) school corporation; or (B) health authorities; or (2) school cannot be conducted through no fault of the teacher; the teacher shall receive regular payments during that time. However, whenever a canceled student instructional day (as defined in IC 20-10.1-2-1) is rescheduled to comply with IC 20-10.1-2-1, each teacher and (notwithstanding IC 20-9.1-3-5) each school bus driver shall work on that rescheduled day without additional compensation."

teacher associations contended that the previous school closing statute actually required school corporations to pay teachers additional compensation for rescheduled days. In *Halley v. Board of School Trustees of the Blackford County School Corp.*,¹²⁶ the court rejected this argument holding that if the legislature had intended teachers to receive additional compensation, it could have included such a provision in the statute.¹²⁷ The amendment now makes additional compensation for rescheduled school days an illegal subject of bargaining.¹²⁸

There are two cases in which courts have considered the question of school calendar in connection with the grandfather clause.¹²⁹ The courts have concluded that the following subjects may be rendered mandatory subjects of bargaining by virtue of the statutory grandfather clause:

- a. The initial reporting dates for teachers;
- b. The dates when no students attended but teachers reported for work;
- c. The length of the grading periods;
- d. The dates when students would be in school for one-half day but teachers would attend for a full day (the portion when teachers, but not students, are present must be bargained); and,
- e. The existence and scheduling of Teacher Days (to the extent they are not also student days).¹³⁰

In *Highland*, the following subjects also were grandfathered: (1) the total number of instructional days in the school year; (2) the total number of teacher work days; (3) the length of grading periods at various academic levels of six weeks

126. 531 N.E.2d 1182 (Ind. Ct. App. 1988).

127. *Id.* at 1185. The court harmonized the school closing law with IND. CODE § 20-6.1-4-3, which prescribes the contents of individual teacher contracts, but does not require a definite ending date for the school year. *Id.* at 1186.

128. *Id.* at 1187. As the court observed, "The amendment foreclosed that option." See also *Springs Valley Teachers Ass'n v. Board of Sch. Trustees of Springs Valley Community Sch.*, No. 47A01-8911-CV-473 (filed May 29, 1990, marked "not for publication"). In *Springs Valley*, the court rejected a demand for extra pay when teachers made up a day after snow cancellation, although the make up day was not a student instructional day. Teachers argued that the 1987 amendment emphasized that made up instructional days must be served without additional compensation. Using negative implication, teachers argued that school corporations must compensate them for days made up for purposes other than instruction. The court rejected the argument, citing *Halley*, and reasoning that the question of paid or make up days was entirely a matter of contract; the collective bargaining agreement in question did not require an extra day's pay for the additional availability occasioned by a snow cancellation day.

129. *Northwestern Sch. Corp. of Henry County Bd. of Sch. Trustees v. Indiana Educ. Employment Relations Bd.*, 529 N.E.2d 847 (Ind. Ct. App. 1988); *Indiana Educ. Employment Relations Bd. v. Highland Classroom Teachers Ass'n*, 546 N.E.2d 101 (Ind. Ct. App. 1989).

130. *Northwestern Sch. Corp.*, 529 N.E.2d at 852-53.

or nine weeks; (4) the dates when grades are due; (5) the date and use of the last day of teacher attendance.¹³¹

Relying on *Eastbrook*, the courts held that certain subjects are illegal subjects of bargaining with respect to the calendar and cannot be grandfathered: (1) the date of the first day of school; (2) the use of the days in which students would be in school for one-half day but teachers would attend for a full day (the portion when students are present); (3) the starting and ending dates of Christmas break and spring break; (4) the scheduling of holiday breaks or recesses; (5) the closing of schools for ISTA Conference on Instruction; (6) the date of the last day of student attendance; (7) the date of Band Day; (8) the existence of teacher days to the extent they are also student days; (9) school enrollment for half-days.¹³²

The IEERB decisions affirmed by the Court of Appeals in *Highland* and *Northwestern* appear inconsistent with respect to the treatment of half days. However, the *Highland* and *Northwestern* cases are reconcilable. Both decisions require that determining the dates of half days be left to the managerial power of the school board. *Northwestern* merely requires the school board negotiate the use and date of the portion of the half-day when the students are not present, and *Highland* only requires negotiation as to the portion of the day when students are not present.

V. TEACHER EVALUATION

The courts twice have had occasion to determine whether teacher evaluation procedures represent mandatory subjects of bargaining or discussion.¹³³ In *Evansville-Vanderburgh*, the court upheld the Board's ruling that evaluation represents a mandatory subject of discussion under Section 5, reasoning that it falls within the plain and ordinary meaning of the phrase "working conditions."¹³⁴ Since there was a total failure to discuss the plan, the court held that the presence of good or bad faith was irrelevant.¹³⁵ The school corporation had committed an unfair labor practice.¹³⁶ There is considerable debate in other states over whether to treat evaluation as mandatory. Some states treat evaluation procedures as mandatory but treat evaluation criteria as permissive.¹³⁷

131. *Highland*, 546 N.E.2d at 103.

132. *Id.*; *Northwestern*, 529 N.E.2d at 852.

133. Board of Sch. Trustees of the Gary Community Sch. Corp. v. Indiana Educ. Employment Relations Bd., 543 N.E.2d 662 (Ind. Ct. App. 1989); and *Evansville-Vanderburgh Sch. Corp. v. Roberts*, 392 N.E.2d 810 (Ind. App. 1979), *aff'd*, 405 N.E.2d 895 (Ind. 1980).

134. *Id.* at 813-14.

135. *Id.* at 814.

136. See Archer, *supra* note 5, at 423 for a more complete discussion. For a more detailed discussion of the committee issue, see *infra* notes 179-216 and accompanying text.

137. See Joan Payne, *What Public Employee Relations Boards and the Courts are*

In *Board of School Trustees of the Gary Community School Corp. v. Indiana Education Employment Relations Board*, the school corporation unilaterally implemented a new teacher evaluation procedure which required that instructional supervisors make written evaluations of teachers. Teachers demanded to bargain about the change, alleging that the policy was grandfathered under Section 5 of the Act as a mandatory subject of bargaining.¹³⁸ The question of supervisors producing written evaluations of teachers had a long history in Gary, having been the subject of disputes in 1967 and in 1971. As a result, the court concluded that the union had proven that the local conditions and practices clause represented an agreement within the meaning of Section 5's grandfather clause.¹³⁹ The court rejected the school corporation's argument under Section 6(b) that this construction effectively prevents it from using new curricular and teaching techniques and, thus, denies it the authority to effectively administer the schools. While the court agreed that the grandfather clause only applies to those items which do not infringe upon the school board's exclusive managerial power, it concluded that the teacher evaluation plan represented a working condition.¹⁴⁰

VI. TEACHER DISMISSAL

There are two primary issues the courts have considered in connection with teacher dismissal. One concerns the relationship between the teacher tenure law and contractual provisions including grievance procedures. The other concerns the appropriate role of the exclusive employee representative when the school corporation notifies a teacher of potential non-renewal or termination of their contract. In general, the courts have held that tenure laws prevail over collective bargaining agreements. In addition, courts have tightly constrained the role of the exclusive employee representative and, perhaps, inappropriately so. Recent statutory amendments address both issues.

A. Collective Bargaining Agreements and the Tenure Laws

In *Gary Teachers Union v. The School City of Gary*,¹⁴¹ the court held that the Teacher Tenure Act (now Teacher Contracts Act)¹⁴² prohibits awarding tenured

Deciding, 13 REV. OF PUB. PERSONNEL ADMIN. Summer, at 58, 67 (1993). The article also collects the recent literature on the scope of bargaining in the public sector.

138. *Board of Sch. Trustees of the Gary Community Sch. Corp. v. Indiana Educ. Employment Relations Bd.*, 543 N.E.2d 662, 663 (Ind. Ct. App. 1989). The collective bargaining agreement contained a local conditions and practice clause which purported to obligate the employer to retain any fact written board and personnel policy covering a local working condition.

139. *Id.* at 666-67.

140. *Id.* at 668 (citing *Evansville-Vanderburgh Sch. Corp. v. Roberts*, 405 N.E.2d 895, 898-99 (Ind. 1980)).

141. 332 N.E.2d 256 (Ind. 1975).

142. IND. CODE § 20-6.1-4-1 to -4-16 (1993).

status to a teacher before he or she meets the statutory requirements.¹⁴³ A collective bargaining agreement between the school corporation and teachers union which purported to grant tenure to teachers after three years instead of the statutory five years was "void as contrary to law."¹⁴⁴ The events took place before the effective date of the Act. However, a number of other courts have concluded that the Act is subordinate to the teacher tenure law on issues of teacher dismissal.¹⁴⁵ By virtue of the tenure law, the court held in *Worthington I* that, under the Act, the Board had the power to determine whether a school corporation had infringed upon the right to form, join and assist in a school employee organization, but no power to order reinstatement of non-tenured teachers who are non-renewed by the school corporation.¹⁴⁶

In *Jay School Corp. v. Cheeseman*,¹⁴⁷ the court held that a school corporation had the right to assign and transfer teachers under Section 6(b)(3), but that right was subordinate to a teacher's right to a position under the tenure law.¹⁴⁸ The court relied on a teacher's statutory right to return after a leave of absence in the absence of any termination of that teacher's contract.¹⁴⁹ In *Board of Trustees of Hamilton Heights School Corp. v. Landry*,¹⁵⁰ the court held that a school corporation had authority to suspend, refuse to pay, and fine a permanent teacher for two days for removing glossaries from the back of 146 science text books.

Whether teacher dismissals could be submitted to binding grievance arbitration was an issue squarely presented in *Michigan City Education Ass'n v. Board of School Trustees of the Michigan City Area Schools*,¹⁵¹ where the school corporation canceled a semi-permanent teacher's indefinite teaching contract after an arbitrator issued an award ordering reinstatement with back pay and full benefits. The Court of Appeals held that a teacher discharge may not be the subject of binding arbitration under a collective bargaining agreement because the policy considerations in the Act place undeniable limitations on the scope of bargaining.¹⁵² Citing Section 3 of the Act, the court reasoned that no collective bargaining agreement may include provisions in conflict with the

143. *Gary*, 332 N.E.2d at 260. It is common for courts to view public sector bargaining as limited by preexisting civil service or tenure laws. See Deborah Tussey, Annotation, *supra* note 98, at 260-66.

144. *Id.* at 258.

145. It was in part this reliance on the Tenure Act that occasioned the need for four separate decisions in the *Worthington-Jefferson* dispute. See *Worthington I*, *Worthington II*, *Worthington III*, and *Worthington IV*, discussed *supra* note 25.

146. *Indiana Educ. Employment Relations Bd., v. Board of Trustees of Worthington-Jefferson Consol. Sch. Corp.*, 355 N.E.2d 269, 274 (Ind. App. 1976).

147. 540 N.E.2d 1248 (Ind. Ct. App. 1989).

148. *Id.* at 1250.

149. *Id.* (citing IND. CODE § 20-6.1-6-1(a) (1984)).

150. 560 N.E.2d 102, 107 (Ind. Ct. App. 1990).

151. 577 N.E.2d 1004 (Ind. Ct. App. 1991).

152. *Id.* at 1006.

school employers' rights as defined in Section 6(b), which gives employers the right to manage the schools including the right to "suspend or discharge its employees in accordance with applicable law."¹⁵³

Following the decision in *Michigan City*, the Act was amended to provide in Section 6(b)(6) that a school corporation may release employees for legitimate reasons "through procedures established in sections 4 and 5 of this chapter."¹⁵⁴ This amendment would appear to permit school employers and exclusive school employee representatives to negotiate procedures for the cancellation of teacher contracts, including procedures that supplement those found in the statute.¹⁵⁵ In addition, the Teacher Contracts Act now expressly authorizes binding arbitration regarding teacher dismissals, and states that it "does not prohibit a school employer and an exclusive representative from collectively bargaining contracts that alter the requirements of IC 20-6.1-4-10, 10.5, 11, 12, 14 and IC 20-6.1-5-15."¹⁵⁶ The quoted sections address the grounds and procedures for dismissing or suspending teachers, but not the number of years of service necessary to achieve tenure. Thus, it is an open issue whether the result in *Michigan City* would be different were the issue relitigated.

B. The Role of the Exclusive Employee Representative

In *Indiana Education Employment Relations Board v. Board of School Trustees of Delphi Community School Corp.*,¹⁵⁷ the court considered a mixed motive discharge: a school employer allegedly did not renew a teacher's contract because of his role as President/Chief Spokesperson of the exclusive employee representative and because of his activities on behalf of another teacher. After the principal asked him to resign, a second non-tenured teacher went to the Association President, a non-tenured teacher, for assistance. The two consulted with the State Teachers Association and determined that no formal grievance procedure was available. The second teacher continued to discuss the resignation request with the school principal. Moreover, the superintendent apparently had informed the second teacher not to fight the resignation request, or he might never get another teaching job.¹⁵⁸ The Association President, in a misguided attempt to help, informed students that the teacher's job was in jeopardy and asked them to tell their parents. He also contacted parents directly and asked them to call school board members. This conduct provoked a strong response from the school principal, who for the first time issued a negative evaluation of

153. *Id.* at 1007 (citing with approval *Anderson Fed'n of Teachers v. Alexander*, 416 N.E.2d 1327 (Ind. Ct. App. 1981) (holding that school corporations' sole authority for hiring and firing teachers could not be restricted by collective bargaining)).

154. Ind. Pub. L. No. 105, 1992 Ind. Acts 2622 (effective July 1, 1992).

155. IND. CODE § 20-6.1-4-11 (1993).

156. Ind. Pub. L. No. 105-1992 § 3, 1992 Ind. Acts 2618 (effective July 1, 1992).

157. 368 N.E.2d 1163 (Ind. App. 1977).

158. *Id.* at 1165.

the Association President and recommended his non-renewal. The school board subsequently voted not to renew the Association President's contract.

The Board held that this constituted a violation of the Act because it represented retaliation for concerted activity protected under Section 6(a).¹⁵⁹ In refusing to enforce the Board order of reinstatement, the court reasoned that the Act did not protect the Association President's conduct. The court did not apply the traditional standards used to consider mixed motive discharges in the private sector. There were three possible motives for dismissal. First, his very role as union President could serve as a basis for anti-union animus; as Chief Spokesman in negotiations, he had been persistent in seeking information that he felt was necessary for meaningful collective bargaining. Second, he represented a teacher in an informal grievance to obtain a change in recommendation concerning that teacher's non-renewal. Third, in pursuing that grievance, he contacted students and parents, and inappropriately involved them in a personnel dispute. Most courts would agree that this third category of conduct is not protected by a bargaining law. However, in the private sector, representing a coworker with an informal grievance *would* be protected.¹⁶⁰

It is precisely the latter conduct that the court found to be unprotected in *Delphi*.¹⁶¹ The court held that the Act allows school employees to engage in activities individually or in concert for purposes of furthering their rights under the Act but does not confer upon an individual a right to use the exclusive representative to address an individual grievance.¹⁶² It only permits an employee to use the exclusive representative to further the best interests of all members of the bargaining unit. The court reasoned that any other construction of the Act would render meaningless language in section 2(o) which defines the term "discuss."¹⁶³ The court's decision turns on a conclusion that the non-renewed teacher did not "petition" his school employer for any redress of personal grievances.¹⁶⁴ The court unduly limited the term "petition" to a written formal request addressed to at least the superintendent of schools or higher authority.¹⁶⁵ However, it makes no formal finding on this point.¹⁶⁶

159. *Id.* at 1164.

160. *See* HARDIN, *supra* note 53, at 150-51 and cases cited therein.

161. *Delphi*, 368 N.E.2d at 1168.

162. *Id.*

163. IND. CODE §. 20-7.5-1-2(o) (1993). Specifically, the Act provides: "Neither the obligation to bargain collectively nor to discuss any matter shall prevent any school employee from petitioning the school employer, the governing body, or the superintendent for a redress of the employee's grievances either individually or through the exclusive representative."

164. *Delphi*, 368 N.E.2d at 1168.

165. Edward P. Archer, *Labor Law, Survey of Recent Developments in Indiana Law*, 12 IND. L. REV. 212, 217 (1979).

166. The term "petition" is defined in BALLANTINE'S LAW DICTIONARY, 944 (3d ed. 1969) as "[a] formal request in writing addressed to one in a position of authority or to a body, such as a municipal council, usually signed by a number of persons. An application. The name given in some jurisdictions to the pleading by which the plaintiff in a civil action, whether in law or

In the private sector, it has long been the rule that an employer may not discharge or discipline an employee for filing or processing a grievance, whether pursuant to a formal contractual procedure or informally in the absence of such a procedure.¹⁶⁷ The NLRB and the federal courts developed the test in *Wright Line* to determine whether the filing of grievances or other protected activity motivated the employer's discipline.¹⁶⁸ Under *Wright Line*, the burden of proof is on the employee to establish that protected conduct was one of the factors motivating the employer's decision to discipline.¹⁶⁹ The burden of proof then shifts to the employer who must prove that it would have taken the same action regardless of the employee's protected activity.¹⁷⁰ The court in *Delphi* does not use this shifting burden of proof to analyze the three potential motives for dismissal. Instead, it lumps protected conduct (representation of another teacher) together with other unprotected conduct (contacting students and parents on that teacher's behalf). The court could have reached the same conclusion by citing the latter inappropriate conduct as justifying the employer's action regardless of the protected activity. This narrower rationale would have better recognized the importance of the exclusive representative's role in informal grievance processing.

The *Delphi* decision was followed five years later in *Indiana Education Employment Relations Board v. Carroll Consolidated School Corporation, Board of School Trustees*.¹⁷¹ The Association requested discussion with the school corporation over an individual teacher's non-renewal. The school corporation replied that it was not obligated to discuss non-renewal, but it would do so if the teacher executed a "waiver of stigma," apparently designed to safeguard the school corporation from any liability for damage to the teacher's reputation. The teacher refused to execute the waiver; the school corporation subsequently

equity, sets forth his cause of action and invokes the jurisdiction of the court. [citation omitted] In some jurisdictions, the pleading by the plaintiff in a special proceeding. The pleading which seeks condemnation of property in a proceeding in eminent domain." It is doubtful what the legislature had this technical meaning of the term in mind when it drafted this section of the Act. More likely, the legislature intended that the word be given its plain meaning. An alternative definition from WEBSTER'S COLLEGIATE DICTIONARY, 721 (3d ed. 1931) is "[a] formal written request, esp. one addressed to a sovereign or political superior," or the more common use of the term "[a]ny formal asking or begging; a prayer; supplication; esp., a solemn request; . . . [t]hat which is asked" Clearly, if the teacher was engaged in ongoing discussion with both the principal and to some extent with the Superintendent of schools, he had indicated his desire to retain his job. This would certainly qualify under the ordinary understanding of request or entreaty.

167. See HARDIN, *supra* note 53, at 150-51 and cases cited therein.

168. *Wright Line*, Div. of *Wright Line, Inc.*, 251 N.L.R.B. 1083 (1980), *enforcement granted*, 662 F.2d 899 (1st Cir. 1981), *cert. denied*, 455 U.S. 989 (1982). The Supreme Court endorsed this test in *N.L.R.B. v. Transportation Management Corp.*, 462 U.S. 393 (1983).

169. *Id.* at 11.

170. *Id.*

171. 439 N.E.2d 737 (Ind. Ct. App. 1982), *reh'g denied*, Oct. 26, 1982.

refused to discuss her non-renewal. The Board held that the school corporation had committed an unfair labor practice.

The court set aside the Board's order, even though the Board had merely recommended, not ordered, reinstatement. It held that the Act creates no obligation for a school corporation to discuss individual personnel actions before action is taken, reasoning there is ample provision in the law for grievance procedures through which parties may subsequently discuss contested personnel actions.¹⁷² The Association's argument that it had requested discussion on behalf of all teachers in the bargaining unit was rejected for fear it would allow the Association to bootstrap from an individual grievance to a discussion under the Act of almost any issue. However, nowhere does the court find that a grievance procedure existed in *Carroll*.¹⁷³ It found only the statutory right for a teacher who has been non-renewed to appear after the fact before a school corporation's governing body and present evidence and argument with assistance of a representative.¹⁷⁴

Although *Carroll* and *Delphi* generally are cited for the same proposition, the cases present two separate issues. *Delphi* addresses a mixed motive discharge. The analytically separate issue presented directly in *Carroll* and indirectly in *Delphi* concerns the right to a union representative. In the private sector, these are referred to as *Weingarten* rights.¹⁷⁵ Most courts that have considered the issue under public employee bargaining laws have recognized a right to a representative.¹⁷⁶ An employee may insist upon union representation at an investigatory interview conducted by the employer which the employee reasonably believes might result in disciplinary action against her.¹⁷⁷ This is protected concerted activity. To discipline an employee for refusing to cooperate in the interview without a union representative is an unfair labor practice.¹⁷⁸ The modern *Weingarten* rule also guarantees union representation at a non-investigatory interview if there is a reasonable basis to believe disciplinary action will result.¹⁷⁹ No union representative is required if the purpose of the interview is merely to inform an employee of disciplinary action that is already final.¹⁸⁰

172. *Id.* at 739.

173. See Archer, *supra* note 75, at 249-51 for a more complete discussion.

174. IND. CODE § 20-6.1-4-14 (1993). However, the court acknowledged that the amendment creating the right to a conference was not in effect at the time of the events in the *Carroll* case.

175. These rights are spelled out in *N.L.R.B. v. Weingarten, Inc.*, 420 U.S. 251 (1975) and in *International Ladies Garment Workers' Union v. Quality Mfg. Co.*, 420 U.S. 276 (1975).

176. See Larry D. Scheafer, Annotation, *What Constitutes Unfair Labor Practice Under State Public Employee Relations Acts*, 9 A.L.R. 5th 20, 73-74 (1981).

177. *Weingarten*, 420 U.S. at 267.

178. See generally HARDIN, *supra* note 53, at 151-58.

179. *Certified Grocers of California, Ltd.*, 227 N.L.R.B. 1211 (1977).

180. See, e.g., *Baton Rouge Water Works Co.*, 246 N.L.R.B. 995 (1979).

Thus, it is consistent with *Weingarten* for a school board to refuse a union representative at a meeting called simply to inform a teacher of its vote not to renew. Arguably, *Weingarten* rights would not attach to a meeting between the superintendent and the teacher in which the superintendent merely informs the teacher of his or her *final* decision to recommend non-renewal. However, the meetings that took place in *Delphi* occurred after a request for the teacher's resignation; the employer was attempting to convince the employee to forfeit employment voluntarily. This is distinct from informing the employee of a decision to discipline. In discussions regarding resignation, the private sector model would probably grant *Weingarten* rights to the employee. Clearly discipline was threatened, but it was not a *fait accompli*.

Both *Delphi* and *Carroll* concerned the duty to discuss under the Act. The court relied heavily on a *reductio ad absurdum* argument that if it recognized a duty to discuss an individual grievance regarding non-renewal, it would open the door to enforcing discussion over each and every individual personnel decision.¹⁸¹ Clearly, this is unworkable. However, the right to a union representative is not that broad—it reaches only cases where discipline is contemplated—and stems from general language in labor relations laws recognizing employees' rights to form, join and assist unions. It is a rule recognizing the unique vulnerability of an employee who faces possible discipline. The court did not need to reach Section 5 and the scope of the duty to discuss. It could have relied on traditional bargaining law language in Section 6(a). There is an appropriate role for the exclusive employee representative to play in processing informal grievances and in assisting employees who face discipline. *Delphi* and *Carroll* fail to recognize this role.

In a legislative end-run around this result, teacher lobbyists obtained passage of an amendment that probably overrules *Delphi* and *Carroll* and provides that a school employer shall discuss “[h]iring, promotion, demotion, transfer, assignment, and retention of certificated employees, and changes to any of the requirements set forth in I.C. 20-6.1-4.”¹⁸² The open question is whether courts will construe this language to require discussion of individual teacher cases or only of conditions which affect the bargaining unit as a whole. This is an area where a broader scope of mandatory bargaining would probably ease administration of the Act.

181. *Indiana Educ. Employment Relations Bd. v. Board of Sch. Trustees of Delphi Community Sch. Corp.*, 368 N.E.2d 1163, 1168 (Ind. App. 1977); *Indiana Educ. Employment Relations Bd. v. Carroll Consol. Sch. Corp.*, 439 N.E.2d 737, 740 (Ind. Ct. App. 1982), *reh'g denied*, Oct. 26, 1982.

182. IND. CODE § 20-7.5-1-5 (1993) (emphasis added) as amended by Ind. Pub. L. 105-1992.

VII. SCHOOL COMMITTEES

A final area where the Board and the courts have interacted concerns the procedures through which the exclusive representative may discuss mandatory subjects of discussion under Section 5 with the school corporation. In a trio of cases, the Indiana courts have held that a school employer may establish a committee to gather information and collect data on any subject, including subjects that are bargainable or discussable.¹⁸³ However, where that committee serves as the sole instrumentality for formulating a proposal to the school board, the school corporation cannot exclude the exclusive representative from the committee.¹⁸⁴ Most commonly, these cases concern curriculum, a mandatory subject of discussion in Indiana, but a nonmandatory subject of bargaining in most states.¹⁸⁵

In *Evansville-Vanderburgh I*,¹⁸⁶ the Court of Appeals concluded that the school corporation violated Section 7(a)(1) of the Act when it unilaterally appointed the members of an evaluation committee formed to study and draft a new teacher evaluation plan. By selecting the evaluation committee without consultation, the court reasoned that the school corporation risked interfering with or restraining school employees in their exercise of rights guaranteed in the Act.¹⁸⁷ The Court of Appeals concluded that, since employees have the right to act in concert for the purpose of establishing or improving discussable matters, the Association has the right to select the members of a committee which performs a critical function in establishing policy concerning a discussable matter.¹⁸⁸ According to the court, the committee entirely displaced the school corporation's Section 5 obligation to discuss evaluation procedures.

The Indiana Supreme Court adopted in most respects the decision of the Court of Appeals but issued independent instructions on this last point of contention. In *Evansville-Vanderburgh II*, the court concluded that both the duty to discuss and the right to confer are part of the Act and must be given effect in accordance with the usual rules of statutory construction which direct that, if possible, all provisions of a statute be given effect.¹⁸⁹ The court held that nothing in the statute would prohibit employers from conferring with any persons they wish in order to gather and receive information.¹⁹⁰ Employers have the

183. *Evansville-Vanderburgh Sch. Corp. v. Roberts*, 395 N.E.2d 291 (Ind. App. 1979) (*Evansville-Vanderburgh I*); *Evansville-Vanderburgh Sch. Corp. v. Roberts*, 405 N.E.2d 895 (Ind. 1980) (*Evansville-Vanderburgh II*); *Evansville-Vanderburgh Sch. Corp. v. Roberts*, 464 N.E.2d 1315 (Ind. Ct. App. 1984) (*Evansville-Vanderburgh III*). For the case in its earliest incarnation, see *Evansville-Vanderburgh Sch. Corp. v. Roberts*, 392 N.E.2d 810 (Ind. App. 1979).

184. *Evansville-Vanderburgh II*, 405 N.E.2d at 902.

185. See Deborah Tussey, Annotation, *supra* note 98, at 301-04.

186. 395 N.E.2d 291 (Ind. App. 1979).

187. *Id.* at 297.

188. *Id.* at 296-97.

189. *Evansville-Vanderburgh II*, 405 N.E.2d at 901.

190. *Id.*

responsibility and the power to create committees to assist them in gathering and receiving information. These committees may be composed of any concerned parents, students, teachers, experts, consultants or others.¹⁹¹ The committees may even be composed entirely of school employees who are not members of the exclusive representative, but only if their purpose is to gather and receive information which is "a partial input into the final formulation of policy."¹⁹² The court further provided: "[T]he exclusive representative cannot be excluded from such a committee when such committee is the sole instrumentality in the drafting and proposal of a discussable matter as was true in the instant case."¹⁹³

The decision in *Evansville-Vanderburgh* has given rise to a substantial amount of unfair labor practice litigation in several school systems.¹⁹⁴ In one case currently on appeal, the Association, citing *Evansville-Vanderburgh*, asserted its exclusive right to appoint all school employees to an elementary computer curriculum committee.¹⁹⁵ The school corporation, referring to past practice, appointed the members of the committee without the approval or consent of the Association. At the time of the hearing on the unfair labor practice, there was no final report or recommendation for change in the computer curriculum and the matter had not yet been discussed at a corporation-wide discussion committee meeting.

Nevertheless, the Board hearing examiner held that the school corporation had committed an unfair labor practice by refusing to give the Association the exclusive right to designate, select, and effectively recommend appointment of all the school employees that serve on the committee.¹⁹⁶ She ordered the corporation to cease and desist, reasoning that the computer curriculum committee in effect served as the sole instrumentality drafting a proposal on a

191. *Id.*

192. *Id.*

193. *Id.* The Supreme Court's decision did not end the dispute in *Evansville-Vanderburgh*, as is documented in *Evansville-Vanderburgh III*, 464 N.E.2d 1315 (Ind. Ct. App. 1984) (where the court holds that the Association must exhaust its administrative remedies before the Board to challenge alleged school board refusals to permit Association input in the selection of committee members).

194. See, e.g., *Highland Classroom Teachers Ass'n and Board of Sch. Trustees of Highland*, Case No. U-91-12-4720, *aff'd on appeal*, in *Board of Sch. Trustees of Highland v. Highland Classroom Teachers Ass'n*, Cause No. 45D01-9204-MI-433 (filed Jan. 13, 1993); *Highland Classroom Teachers Ass'n and Highland*, Case No. U-92-17-4720 (hearing examiner's report dated Feb. 3, 1993); and *Highland Classroom Teachers Ass'n and Board of Sch. Trustees of Highland*, Case No. U-92-24-4720 (hearing examiner's report dated Feb. 3, 1993). See also *Marion Teachers Ass'n and Board of Sch. Trustees of Marion Community Sch. Corp.*, Case Nos. U-91-16-2865, U-91-16-2865, U-89-13-2865.

195. *Board of Sch. Trustees of Highland v. Highland Classroom Teachers Ass'n*, Cause No. 45A03-9304-CV-144 (filed Nov. 15, 1993).

196. *Highland Classroom Teachers Ass'n and Board of Sch. Trustees of Highland*, Case No. U-91-12-4270.

mandatory subject of discussion. On appeal, the Court of Appeals for the Third Circuit affirmed the Board's decision, but construed it to require that the exclusive representative appoint some of the teacher members of the Committee.¹⁹⁷

The Board has held that the exclusive representative has the *exclusive* right to designate or select *all* school employees for such committees.¹⁹⁸ When a committee serves as the sole instrumentality for discussion, the Board reasons that the exclusive representative retains the traditional right to designate who will represent it in collective bargaining activities, including discussion. Since discussion actually occurs in committee, parties essentially have delegated their statutory duty to the committee members to discuss in accordance with Section 5 of the Act.

The committee decision implicates a number of issues. In the private sector, the NLRB and the courts have distinguished among four independent concepts: 1) the duty to meet at reasonable times;¹⁹⁹ 2) the duty to confer in good faith;²⁰⁰ 3) the duty to furnish information;²⁰¹ and 4) the right to select a bargaining representative.²⁰² All these concepts seem to be combined, and perhaps unnecessarily so, in the Board's committee rule.

First, the Act contains within it a duty to meet at reasonable times. It is contained both in the definition of what it means to "bargain collectively"²⁰³ and also in the definition of the term "discuss."²⁰⁴ This language is similar to that of the National Labor Relations Act, which provides in section 8 that to bargain collectively is "the performance of the mutual obligation of the employer and the representative of the employees to meet at reasonable times and confer in good faith with respect to wages, hours, and other terms and conditions of employment"²⁰⁵ Commentators have observed that the NLRA does not require any particular frequency within which the parties must meet, nor does it define the term "reasonable."²⁰⁶ The parties must meet without unreasonable delay, and an employer may not insist upon bargaining by mail or insist that the proposals be put in writing.²⁰⁷ Moreover, a party cannot defend a charge of

197. Board of Sch. Trustees of Highland v. Highland Classroom Teachers Ass'n, Cause No. 45A03-9304-CV-144 (filed Nov. 15, 1993, at 9).

198. Early commentary on *Evansville-Vanderburgh I and II* forecast this possible interpretation, but rightly criticized and rejected it as one the legislature could not reasonably have intended. See Archer, *supra* note 5, at 426.

199. See generally HARDIN, *supra* note 53, at 592-93, 603-04, 632-35.

200. *Id.* at 593-94, 608-50.

201. *Id.* at 650-85.

202. *Id.* at 934-35, 941-42.

203. IND. CODE § 20-7.5-1-2(n) (1993).

204. IND. CODE § 20-7.5-1-2(o) (1993).

205. 29 U.S.C. § 158 (d) (1988).

206. See HARDIN, *supra* note 53, at 592-93, 603-04.

207. *Id.* at 603 nn.120-21, and cases cited therein.

failure to meet at reasonable times by arguing the busy schedule of its representative or negotiator.²⁰⁸ In other words, the NLRB will look at all the facts and circumstances of the case to give meaning to the phrase “reasonable times.” Generally, it will *not* direct the parties to meet in a specific time or place. This is precisely what the committee decision does. The committee decision not only dispenses with any inquiry into the reasonableness of the corporation-wide discussion committee, it also dictates the framework for discussion.

Second, the private sector model would independently examine the duty to “confer in good faith.”²⁰⁹ To determine whether there has been a refusal to confer, the NLRB will examine the “subjective condition of ‘good faith’” as well as the requirement that the parties “confer.”²¹⁰ The NLRB has described the duty to confer as requiring that the parties do so “with the view of reaching an agreement if possible.”²¹¹ Similarly, the obligation to confer in good faith has been defined as one requiring that bargaining take place “with a *bona fide* intent to reach an agreement.”²¹² This requires sincere negotiations with an intent to settle differences and arrive at an arrangement and is inferred from all the facts and circumstances of the bargaining relationship, including conduct at or away from the bargaining table. The Board has adopted very similar standards in the definition of the term “discuss” under the Act.²¹³ In the committee decision, the Board has made a conceptual leap that it is no longer possible to discuss a proposal after a committee has formulated it. The Board has imported into the Act the view that input can only be meaningful when it is given as part of the process of formulating the proposal.

In the private sector, input is considered meaningful if given before implementation of a change on a mandatory subject of bargaining. This usually means that it is given *in response to* a concrete proposal. However, bargaining is not required where it is futile. Bargaining may be futile after management has implemented a new policy.²¹⁴ In addition, the duty to bargain arises upon a request, that is, a demand to bargain made by the union to the employer. If the union fails to make a timely demand for bargaining, it may waive its rights.²¹⁵

208. *Id.* at 604 n.122 and cases cited therein.

209. 29 U.S.C. § 158(d) (1988).

210. See HARDIN, *supra* note 53, at 604.

211. *Id.* at 592 (citing NLRB v. Highland Park Mfg. Co., 110 F.2d 632, 637 (4th Cir. 1940)).

212. *Id.* at 593 n.42.

213. That term is defined as the duty “to meet at reasonable times to discuss, to provide meaningful input, to exchange points of view, with respect to items enumerated in section 5 of this chapter. This obligation shall not, however, require either party to enter into a contract, to agree to a proposal, or to require the making of a concession.” IND. CODE § 20-7.5-1-2(o) (1993).

214. See HARDIN, *supra* note 53, at 699-700, 708-10.

215. *Id.* at 708.

The Board decision concludes as a matter of law that such discussion would be futile where a committee is charged with a particularly complex and involved task requiring multiple steps to implement.

An alternative reasonable decision would be to give the parties the benefit of the doubt, permit them to engage in discussion at a system-wide discussion committee that receives a concrete proposal for change in the curriculum, and then determine, in light of all the facts and circumstances, whether the parties have met their duty to confer in good faith. One could argue that discussion itself is unnecessary until a concrete proposal for change exists.

An intellectually distinct issue also present in the committee cases *sub rosa* is the question whether the exclusive representative can have adequate information upon which to base meaningful discussion if it does not appoint all the teacher representatives on the committee that formulates the proposal. The exclusive representative has an interest in knowing what alternative proposals were considered and rejected by the committee so that it might be better equipped to engage in meaningful discussion at a corporation-wide discussion committee. However, the Board need not adopt its present committee decision to meet this concern. The Board could give the exclusive representative the right to designate one school employee member to a committee consisting of members otherwise designated by the school employer. The designee could keep minutes and confer with the leadership regarding the progress of the committee.²¹⁶ Although curriculum committees have no power to adopt a new curriculum, they do receive some delegation of authority. By analogy, the exclusive representative has a right to information about the discussions of the committee. This alternative model would permit an exclusive representative to designate a member of a committee that is engaged in work on a discussable subject as part of the representative's right to information for meaningful bargaining or discussion but would preserve the duty to discuss the subject until there is in fact a concrete proposal. It would then be more efficient and cost effective to engage in the statute's required discussion within the framework of a school corporation-wide committee that meets on some regular basis. This alternative model has the advantage of retaining for the school employer the statutory right of "conferring with any citizen, taxpayer, student, school employee, or other person considering the operation of the schools and the school corporation."²¹⁷ However, in the absence of a corporation-wide

216. It does not require much of a stretch to adopt such a rule, for there is some recognition in Indiana that when a governing body of a public agency appoints a committee to perform public business, the Indiana Public Meetings and Records Law may apply. For example, Indiana defines the term "governing body" of a public agency to include "a board, commission, authority, council, committee, body, or other entity" that "takes official action on public business" or "any committee appointed directly by the governing body or its presiding officer to which authority to "take official action upon public business has been delegated." IND. CODE § 5-14-1.5-2(b) (1993).

217. IND. CODE § 20-7.5-1-2(o) (1993).

discussion committee, the exclusive representative would still be entitled to meaningful discussion within the curriculum committee.

One final point concerns the Board's rationale for adopting the committee decision. Specifically, the Board relies in large measure upon a party's right to select its own representatives in collective bargaining. The rule is well established in the private sector that the identity of a party's bargaining spokesperson or representative is considered a non-mandatory subject of bargaining, and insistence to the point of impasse on a particular bargaining party will represent an unfair labor practice.²¹⁸ The Board reasons that the duty to discuss is an exclusive duty.²¹⁹ However, one could argue that the Act's duty to discuss is not exclusive. The Act confers on the school employer the right to consider the interests and concerns of parents, students, and other members of the public education community; thus it anticipates that a school corporation will discuss Section 5 subjects not only with the exclusive representative, but also with others. This is quite different from the duty to bargain, a duty which is exclusive by definition: it is a violation of the duty to bargain for an employer to bargain directly with employees.²²⁰

To illustrate how different the Act is in its treatment of the term "discuss," the Indiana Supreme Court held that an employer may compose a committee entirely of school employees who are not members of the exclusive representative organization, as long as the committee is gathering or receiving information which is only a partial input into the final formulation of policy.²²¹ Thus, the Indiana Supreme Court recognizes that the duty to discuss is not an exclusive one. Selecting committee members based on their nonmembership in the exclusive employee representative would probably be considered unlawful discrimination based upon union affiliation under Section 8(a)(3) of the NLRA. The Board's committee decision in effect renders the duty to discuss exclusive by using the intellectual framework of a party's right to select its representative to mandate that the exclusive representative select all those persons with whom the employer may discuss a Section 5 subject in a sole instrumentality committee.

In sum, there are a number of distinct labor relations doctrines that the courts and the Board have elided in the committee cases. This is another area where a broader scope of mandatory bargaining in place of the narrow scope of bargaining and broad scope of discussion would probably produce simpler administration. The courts will reexamine the issue in the near future: it requires clarification.

218. See *HARDIN*, *supra* note 53, at 604-07, 935-36.

219. IND. CODE § 20-7.5-1-5 (1993) provides that a school employer shall discuss Section 5 subjects with the exclusive representative.

220. *Id.* at 601-02.

221. *Evansville-Vanderburgh II*, 405 N.E.2d 895, 902 (Ind. 1980).

VIII. UNION SECURITY AND FAIR SHARE FEES

Indiana follows the mainstream federal court rulings regarding the nature and extent of permissible representation fees. However, its approach to union security is somewhat different as to mechanics. Indiana does not allow an agency fee as a condition of employment but permits a negotiated agreement, enforceable as a debt in state court, that teachers pay such a fee.

The Act makes no provision for agency service fees.²²² In *Anderson Federation of Teachers v. Alexander*,²²³ the court held that an agency shop agreement was unlawful under the Act. The court reasoned that making payment of an agency service fee a "condition of employment" meant that teachers who refused to pay the fee would be dismissed from employment on a ground not provided in the Indiana Teacher Tenure Act.²²⁴ Since the Tenure Act provides the exclusive procedure for dismissing teachers, it would conflict with Sections 6(b) and 3 of the Act to permit bargaining over agency service fee.²²⁵

In *Fort Wayne Education Ass'n, Inc. v. Goetz*,²²⁶ the court authorized a modified form of union security. The employer and exclusive representative may agree that teachers are obligated to pay a representation fee *without* making it a condition of employment; the court validated the action of the Association in proceeding to small claims court to collect from teachers who failed to voluntarily authorize a payroll deduction or to make the payment.²²⁷ The court found that teachers were not obligated to pay for the amount used for political activities, which avoids any possible First Amendment problems.²²⁸ The Association had put together an internal rebate procedure so that a non-member could petition for a rebate of improperly expended funds. The court observed that since there were internal remedies available to the non-member employees, there was no violation of their constitutional rights.²²⁹

222. The term "agency service fee" refers to a collective bargaining agreement clause that requires employees to pay to an exclusive representative a fee in exchange for representation services. There are a number of possible variations of the union security clause, including a maintenance of membership clause (which requires an employee who has joined a union to remain a member for the duration of the collective bargaining agreement), or a union shop clause (which is one that requires an employee to actually become a member of the union as a condition of employment). These latter two provisions violate the First Amendment rights of public employees and therefore are not seen in the public sector. However, the agency shop provision is fairly common, and also goes by the name "fair share fee." See generally HARDIN, *supra* note 53, at 1489-1566.

223. 416 N.E.2d 1327, 1333 (Ind. Ct. App. 1981).

224. *Id.* at 1329; IND. CODE § 20-6.1-4-10 to -4-14 (1993).

225. The court did not say whether it was necessary for teachers to authorize deduction of the fee from their wages.

226. 443 N.E.2d 364 (Ind. Ct. App. 1982), *reh'g denied*, Feb. 3, 1983.

227. *Id.* at 373.

228. *Id.*

229. See *Abood v. Detroit Bd. of Educ.*, 431 U.S. 209 (1977); and *Brotherhood of Ry. &*

In *Abels v. Monroe County Education Ass'n*,²³⁰ the court held that a representation fee should be calculated by subtracting the cost of political, ideological, organizing, and legal expenses unrelated to collective bargaining from the amount of dues members are required to pay. The court specifically upheld charges to individual teachers for services provided by the state and national affiliates of the local association.²³¹

In *New Prairie Classroom Teachers Ass'n v. Stewart*,²³² the Association again filed small claims actions against teachers who failed to pay the representation fee. The court upheld judgments against each individual non-paying teacher, but held that the bargaining representative has the burden of proving the proportion of its funds that it expends for political or ideological purposes.²³³ It cited with approval the Supreme Court's decision in *Abood*, concluding that in the public sector, related budgetary and appropriation decisions form an integral part of the bargaining process²³⁴ and, thus, the bargaining representative may collect fees for such lobbying activities.

The court next rejected as inadequate a rebate procedure that allowed the temporary use for political purposes of non-member representation fees.²³⁵ Following the United States Supreme Court, the court held that even this temporary use of involuntary fees represented a violation of teachers' First Amendment right of freedom of association.²³⁶ The rebate procedure was a stringent one; only by complying with its precise terms could a teacher recover money wrongfully collected.²³⁷ The court concluded that although the payroll deductions were not a condition of employment, the payment itself was mandatory which meant that the Association was in fact extracting an involun-

Steamship Clerks v. Allen, 373 U.S. 113 (1963).

230. 489 N.E.2d 533, 539 (Ind. Ct. App. 1986), *cert. denied*, 480 U.S. 905 (1987).

231. *See also* *New Prairie Classroom Teachers Ass'n v. Stewart*, 487 N.E.2d 1324 (Ind. Ct. App. 1986), *cert. denied*, 480 U.S. 917 (1987) (approving charges for the services of lawyers, expert negotiators, economists, and research staff employed by the state and national affiliates of the local, and expenditures by the state and national affiliates for lobbying governmental agencies other than the school corporation).

232. *Id.*

233. *Id.* at 1328.

234. *Id.* at 1329. *See supra* note 229.

235. *Fort Wayne Educ. Ass'n v. Aldrich*, 527 N.E.2d 201 (Ind. Ct. App. 1988), *trans. granted*, 585 N.E.2d 6 (1992).

236. *Id.* at 206-08 (citing *Chicago Teachers Union v. Hudson*, 475 U.S. 292 (1986) and *Ellis v. Brotherhood of Ry. Workers*, 466 U.S. 435 (1984)).

237. *Id.* at 206. For a more complete discussion, see Terry A. Bethel, *Labor and Employment Law, Recent Employment Law Decisions of the Seventh Circuit and the Indiana Courts*, 26 IND. L. REV. 1065, 1073-75 (1993).

tary loan during the current year.²³⁸

The Indiana Supreme Court resolved a conflict between the courts of appeals over proof of chargeable expenses in *Fort Wayne Education Ass'n v. Aldrich*.²³⁹ The Court adopted the Second District's opinion in *Albro v. Indianapolis Education Ass'n*.²⁴⁰ As a result, the exclusive representative has the burden of proving chargeable, as well as nonchargeable expenses.²⁴¹

IX. REVIEW OF ARBITRATION AWARDS

Indiana courts have reviewed the substance of arbitration awards and have intervened to safeguard the statutory prerogatives of school corporations by finding arbitration awards encroaching upon Section 6(b) rights void as against public policy. This is true regardless of whether the objecting party files a timely motion to vacate or to modify the award ninety days after its issuance under the Uniform Arbitration Act.²⁴²

Indiana has adopted a version of the Uniform Arbitration Act.²⁴³ A written agreement to arbitrate is valid and enforceable unless it can be revoked on the same grounds as any other contract.²⁴⁴ The method for appointing the arbitrators must be determined by the terms of the arbitration agreement, if specified therein, or the court, in the absence of such an agreement, may appoint an arbitrator.²⁴⁵ The Uniform Arbitration Act provides that the arbitration award must be in writing and signed by all the arbitrators concurring therein.²⁴⁶ Parties to the arbitration may apply to modify or correct the award,²⁴⁷ to confirm the award,²⁴⁸ or to vacate the award.²⁴⁹ Under Indiana law, the trial

238. The court reaffirmed *Fort Wayne* in *Ake v. National Educ. Ass'n-South Bend*, 531 N.E.2d 1178 (Ind. Ct. App. 1988). The court rejected an argument that teachers' failure to give notice under the State Tort Claims Act invalidated their lawsuit protesting an inadequate rebate procedure. The court reaffirmed that the rebate procedure improperly collected fair share fees for use for political purposes with which non-member teachers disagreed.

239. 594 N.E.2d 781 (Ind. 1992).

240. 585 N.E.2d 666 (Ind. Ct. App. 1992).

241. *Id.* at 669. The Indiana Supreme Court remanded *Fort Wayne Educ. Ass'n v. Aldrich* for further proceedings in accordance with its opinion. *Aldrich*, 594 N.E.2d 781.

242. On whether a school board may arbitrate a permanent teacher's dismissal, see also *Board of Sch. Comm'r of Indianapolis v. Haynes*, Case No. 49A02-9012-CV-756 (filed Sept. 26, 1991, marked "not for publication").

243. IND. CODE §§ 34-4-2-1 to -2-22 (1993).

244. IND. CODE § 34-4-2-1 (1993).

245. IND. CODE § 34-4-2-4 (1993).

246. IND. CODE § 34-4-2-9 (1993).

247. IND. CODE § 34-4-2-10 (1993).

248. IND. CODE § 34-4-2-12 (1993).

249. IND. CODE § 34-4-2-13 (1993). "[T]he court shall vacate an award where: (1) the award was procured by corruption or fraud; (2) there was evident partiality by an arbitrator appointed as a neutral or corruption in any of the arbitrators or misconduct prejudicing the rights of any party; (3) the arbitrators exceeded their powers and the award cannot be corrected without effecting the merits of the decision upon the controversy submitted; (4) the arbitrators refused to

court must order the parties to proceed with arbitration upon a showing that there is an agreement to arbitrate between the parties, but the court also may stay an arbitration where there is no agreement to arbitrate.²⁵⁰ Implicit is the rule that the court rather than the arbitrator makes the final determination on whether there is in fact an agreement to arbitrate.

In *DeKalb County Eastern Community School District v. DeKalb County Eastern Education Ass'n*,²⁵¹ the court applied the private sector standard for determining arbitrability. A number of school boards formed a special education cooperative to be administered by the DeKalb Board of Education. The cooperative contract provided that teachers would bring grievances to their own local school board. However, the cooperative contract also provided that the DeKalb Board was responsible for contractual obligations to teachers. Teachers filed a grievance under the grievance procedure of the DeKalb collective bargaining agreement. These teachers were not employed specifically by nor did they teach in DeKalb. The court held that there was no basis for the trial court to have concluded that the agreement to arbitrate in question was "susceptible of an interpretation that cover[ed] the grievances for the special ed co-op teachers."²⁵²

The phrase "susceptible of an interpretation" evokes the *Steel Workers Trilogy* of the United States Supreme Court.²⁵³ Under the *Trilogy*, "[u]nless the parties expressly provide that the arbitrator is to determine arbitrability, that determination rests with the courts."²⁵⁴ However, the court need only determine whether the claim on its face is governed by the contract. Even if the court believes that the grievance is frivolous or baseless, doubts should be resolved in favor of arbitration. The key language is that the court must be able to say with positive assurance that the arbitration clause is not "susceptible to an interpretation that covers the dispute."²⁵⁵ After the arbitrator has issued an award, the award is presumed legitimate so long as it draws its essence from the

postpone the hearing upon sufficient cause being shown therefor or refused to hear evidence material to the controversy or otherwise so conducted the hearing, contrary to the provisions of section 6 of this chapter, as to prejudice substantially the rights of a party; or (5) there was no arbitration agreement and the issue was not adversely determined in proceedings under section 3 of this chapter and the party did not participate in the arbitration hearing without raising the objection."

250. IND. CODE § 34-4-2-3 (1993).

251. 513 N.E.2d 189 (Ind. Ct. App. 1987).

252. *Id.* at 193.

253. The *Steel Workers Trilogy* consists of *United Steelworkers v. American Mfg. Co.*, 363 U.S. 564 (1960); *United Steelworkers v. Warrior & Gulf Navigation Co.*, 363 U.S. 574 (1960); and *United Steelworkers v. Enterprise Wheel & Car Corp.*, 363 U.S. 593 (1960).

254. FRANK ELKOURI AND EDNA A. ELKOURI, *HOW ARBITRATION WORKS* 27 (4th ed. 1985).

255. *Id.*

collective bargaining agreement. The court should not review the merits of grievances.²⁵⁶

Although the Uniform Arbitration Act itself does not define the terms "arbitrator" or "arbitration award," a court has held that a school principal's disposition of a teacher grievance at an interim step in the grievance procedure did not represent an arbitration award under the Uniform Arbitration Act. In *Prairie Heights Education v. Board of School Trustees of Prairie Heights Community School Corp.*,²⁵⁷ special education teachers who belonged to a special education cooperative including DeKalb disputed the manner in which their salary was calculated when they were reassigned from one member of the cooperative to another. School principals handled the teachers' grievance and agreed to restore the pay without interest. After the school superintendent rescinded that decision, the teachers filed a complaint requesting that the court enforce the principals' grievance settlement under the Uniform Arbitration Act. The court held that the principals had no authority to fix or set salaries and compensation for teachers and rejected the argument that the grievance settlement was an arbitration award under the Uniform Arbitration Act.²⁵⁸

The Indiana Court of Appeals has upheld an arbitrator's power to decide whether additional responsibilities for a specific position are subject to the posting and negotiation rights under a collective bargaining agreement on *Eastbrook Community School Corp. v. Eastbrook Education Ass'n*,²⁵⁹ the school corporation argued that it had a statutory power to assign duties to specific positions such as the head basketball coach, that these duties were administrative and not subject to the collective bargaining agreement.²⁶⁰ The Association filed a grievance, arguing that the school corporation's failure to post and fill certain positions in accordance with a procedure contained in the contract represented a breach of contract. There was a past practice of negotiating both the duties and pay scales for extra-curricular jobs. The arbitrator ordered that jobs be posted and filled in accordance with the contract. The school corporation moved to vacate the award, arguing that the arbitrator had essentially made

256. *United Steelworkers v. Enterprise Wheel & Car Corp.*, 363 U.S. 593, 596 (1960). See generally HARDIN, *supra* note 53, at 955-67.

257. 585 N.E.2d 289 (Ind. Ct. App. 1992).

258. *Id.* at 293. An alternative way to analyze this case would be to treat it as an example of repudiation of a grievance settlement, which is a refusal to bargain in good faith under traditional labor law principles. However, in order for the rules on repudiation grievance settlements to apply, the teachers must show that the principals' decision represented such a settlement. Ordinarily, the mere issuance of a disposition at an interim step of the grievance procedure is not enough. The contract itself must provide that, in the absence of any appeal, interim disposition becomes a final and binding settlement of the grievance. In this instance, the case indicates that the principals' decision did not have that effect, but was instead rescinded by the superintendent, presumably in a timely fashion.

259. 566 N.E.2d 63 (Ind. Ct. App. 1990).

260. *Id.* at 65.

a bargaining unit determination outside the scope of his jurisdiction because the duties attached to the positions in question were supervisory and administrative. The court rejected this argument and reasoned that the dispute centered on whether the vacancies were certified positions within the meaning of the contracts. Since the parties were free to agree by contract that such questions would be arbitrated, the court would not interfere.²⁶¹ The court also rejected the argument that the arbitrator exceeded his authority and essentially amended the agreement. The court noted that an arbitrator's award is void and subject to collateral attack if the arbitrator awards a form of relief upon which public policy does not permit the parties voluntarily to agree.²⁶² However, that was not the case in *Eastbrook*. The arbitrator did not determine the makeup of the bargaining unit, but merely defined the term "certified" for purposes of the contract's posting provisions.²⁶³

Most cases involve arbitration awards that are overturned because the arbitrator exceeded the scope of his or her authority or issued an award that was void as against public policy. In *School City of East Chicago v. East Chicago Federation of Teachers*,²⁶⁴ the court held that an arbitration award was void as against public policy because it contained an order that the employer pay punitive damages. The court paid lip service to the prevailing rule that arbitrators are not generally bound by principles of substantive law since the parties bargain for a common sense solution.²⁶⁵ However, the court reasoned that it could intervene when public policy demanded.²⁶⁶ Moreover, since the Indiana legislature expressly declared that there were four grounds upon which the relationship between school corporations and teachers associations were not comparable to the private sector, the court held it was not bound by federal policy on the finality of arbitration awards. Instead, where an arbitrator has not followed the law, a reviewing Indiana court may: (1) disregard the error as within the authority of the arbitrator; (2) use the error to vacate or modify the award; or (3) render the award void as being beyond the arbitrator's jurisdiction.²⁶⁷ The latter was the case in *East Chicago*. The arbitrator had no power to award punitive damages and this remedy rendered the arbitration award void.²⁶⁸

In *Gary Teachers Union, American Federation of Teachers v. Gary Community School Corporation of Indiana*,²⁶⁹ the arbitrator attempted to

261. *Id.* (citing *School City of E. Chicago v. East Chicago Fed'n of Teachers*, 422 N.E.2d 656 (Ind. Ct. App. 1981)).

262. *Id.* at 66.

263. *Id.*

264. 422 N.E.2d 656, 663 (Ind. Ct. App. 1981).

265. *Id.* at 662.

266. *Id.*

267. *Id.*

268. *Id.* at 663. See Archer, *supra* note 8, at 233 for a more complete discussion.

269. 512 N.E.2d 205 (Ind. Ct. App. 1987).

exercise authority under the contract “to fashion an appropriate remedy.”²⁷⁰ The court again vacated the arbitration award, holding that the contract was void as against public policy as defined by the Act because it was beyond the arbitrator’s scope of authority.²⁷¹ The arbitrator had awarded punitive damages in the amount of 10% of wages.

In *Tippecanoe Education Ass’n v. Board of School Trustees of Tippecanoe School Corp.*,²⁷² the court vacated an arbitration award where the arbitrator had determined that a teacher’s transfer was not for the general welfare of the school corporation. The court held that the arbitrator had usurped a function delegated to the local school corporation under section 6(b) of the Act which provides that only the school corporation can determine the general welfare for the school district.²⁷³ The arbitrator interpreted contract language which provided that “the Board reserves the right to make involuntary transfers for the general welfare of the corporation.”²⁷⁴ According to the court, the award violated public policy as codified in the Act which essentially prohibits a school board from delegating to an arbitrator the authority to decide such a dispute if it conflicts with the responsibility entrusted to the school board in its sole discretion under the statute. However, the Court agreed that a school board and teacher association could, under section 5 of the Act, mutually agree to bargain procedures and criteria relative to decisions such as the hiring and transfer of teachers, and a school board may bind itself to observe these procedures by express contractual provisions.²⁷⁵

An arbitrator was found to have no authority to prioritize building needs and seniority or length of service in transfer or reassignment decisions in *Fort Wayne Education Ass’n v. Board of School Trustees of Fort Wayne Community Schools*.²⁷⁶ The arbitrator denied the grievance of a teacher who complained another teacher had benefitted from favoritism, reasoning that there had been no violation of the contract and that, in considerations of transfer and reassignment, building needs outweigh seniority or length of service. The court modified the award by deleting the language on building needs and seniority because such issues were rendered moot by the arbitrator’s determination that no prohibited reassignment had occurred. In *Michigan City Education Ass’n v. Board of School Trustees of the Michigan City Area Schools*,²⁷⁷ the court held that a school corporation may bind itself to grievance arbitration and may bargain over procedures and standards for dismissing teachers, but it may not delegate to an

270. *Id.* at 206.

271. *Id.* at 207.

272. 429 N.E.2d 967, 975 (Ind. Ct. App. 1981). See Archer, *supra* note 8, at 237 for a more detailed discussion.

273. *Tippecanoe*, 429 N.E.2d at 973.

274. *Id.* at 969.

275. *Id.* at 974-75.

276. 569 N.E.2d 672 (Ind. Ct. App. 1991).

277. 577 N.E.2d 1004 (Ind. Ct. App. 1991).

arbitrator the power to rule on teacher dismissals.²⁷⁸ However, in *Southwest Parke Education Ass'n v. Southwest Parke Community School Trustees Corp.*, the trial court had remanded a teacher dismissal case to the arbitrator for a determination of whether the school board discriminated against the teacher for union activities.²⁷⁹

X. CONCLUSION

By adopting a dual obligation to bargain and to discuss, Indiana set the courts and the Board on a less traveled road to woods where it is sometimes harder to see the broader forest of labor relations policy for the specific statutory trees of the Act. The courts and the Board have departed from traditional models for labor relations in certain areas, largely in an attempt to reconcile competing statutory commands regarding the duty to bargain, the duty to discuss, and the duty to maintain managerial prerogative. All collective bargaining laws balance the interests of the parties. Where to draw the line between respective parties' rights and obligations merits continuing re-examination. Now that Indiana has had twenty years of experience with teacher bargaining, it may be time to consider whether the current narrow scope of mandatory bargaining and broad scope of mandatory discussion represent the best balance. Many districts continue to bargain over subjects that would otherwise be discussable, or even matters of management prerogative, because of the grandfather clause. A broader scope of bargaining, combined with a brighter line as to managerial prerogative, might enhance labor relations and serve the public interest.

278. See also *Anderson Fed'n of Teachers v. Alexander*, 416 N.E.2d 1327 (Ind. Ct. App. 1981).

279. 427 N.E.2d 1140 (Ind. Ct. App. 1981), *reh'g denied*, 429 N.E.2d 675 (1981).

“TURNING POINT”: THE FOUNDERING OF ENVIRONMENTAL LAW AND POLICY IN INDIANA?

ROBERT F. BLOMQUIST*

INTRODUCTION

I believe the State of Indiana is at a turning point. The Council of State Governments soon will release a survey that ranks Indiana 50th in both per capita and per industry spending on environmental and natural resource issues. We cannot continue to trail the rest of the nation.¹

The above quotation from Kathy Prosser, Commissioner of the Indiana Department of Environmental Management, set the tone for evaluating environmental and natural resource developments in Indiana during 1993. Despite some notable legislative, administrative, and judicial contributions,² 1993 has been a year characterized by a crisis of environmental law and policy in the state.³ The reason for this problem is traceable to a dispute between Governor Evan Bayh and the Indiana General Assembly over the state budget. This dispute led to an unprecedented action by the Governor and the Indiana Department of Environmental Management (IDEM) when the General Assembly passed Indiana's 1993-95 biennial budget over the Governor's veto: commencement of "the process of returning all permitting functions for the NPDES [National Pollutant Discharge Elimination System] and RCRA [Resource Conservation and Recovery Act] programs to [the United States Environmental Protection Agency] EPA," while "cutting back dramatically in [IDEM's] solid

* Professor of Law, Valparaiso University School of Law; B.S., 1973, University of Pennsylvania (Wharton School); J.D., 1977, Cornell Law School. Vice-Chair, Indiana Pollution Prevention Board. The views of this article are my own and should not be ascribed to the Indiana Pollution Prevention Board. I thank Barton R. Peterson, Chief of Staff to Governor Bayh, Kathy Prosser, Commissioner of the Indiana Department of Environmental Management (IDEM), and IDEM attorney Joyce Martin for their generous assistance in providing background information for this article. I am also indebted to my research assistant, Maureen L. McCarthy, for her excellent contributions to this article.

1. Office Memorandum from Kathy Prosser, IDEM Commissioner, to IDEM Staff (July 28, 1993) at 2 [hereinafter Prosser Memorandum].

2. See *infra* notes 38-103 and accompanying text.

3. The climate of environmental progress in Indiana was quite different a few years ago. Cf. 1989-90: "A watershed in the evolution of environmental law in Indiana" brought about by the crafting of several important legal innovations protective of the state's environmental and natural resources. Robert F. Blomquist, *The Evolution of Indiana Environmental Law: A View Toward the Future*, 24 IND. L. REV. 789, 789 (1991) (footnote omitted). See also, John C. Hamilton, *Environmental Law: The Roles of Commerce, Citizens, and the Land in an Era of Intensifying Competition*, 26 IND. L. REV. 921, 921 (1993) ("Indiana in 1992, was unusually active . . . in terms of expanding the body of environmental law. . .").

waste permitting programs.”⁴ As explained in a letter from Governor Bayh to Carole Browner, Administrator of the U.S. EPA:

The Indiana General Assembly recently passed Indiana’s 1993-95 budget, overriding my veto. Because of major funding deficiencies in that budget, the State of Indiana cannot currently fund and implement important components of some federally-delegated programs.

Specifically, the Indiana Department of Environmental Management (IDEM) cannot meet the staffing and administrative demands of permitting functions in both the Resource Conservation and Recovery Act (RCRA) and the National Pollutant Discharge Elimination System (NPDES) because of inadequate funding. Therefore, I have directed Kathy Prosser, the Commissioner of the IDEM, to work closely with EPA Region V to immediately begin the process of voluntarily returning federally-delegated program responsibilities in these programs pursuant to 40 CFR 271.23(a) (RCRA) and 40 CFR 123.64(a) (NPDES). This letter therefore serves as the notice to EPA required by federal law and regulations.⁵

Holding out a faint prospect for a last-ditch reconciliation with the General Assembly, Governor Bayh ended his letter on a note of hope: “If the budget deficiencies are adequately addressed in the 1994 legislative session, the State of Indiana intends to maintain primacy over these programs. In the meantime, IDEM will continue to prepare the required transfer plan for submission to Region V [of the EPA] in cooperation with [EPA] staff.”⁶

4. Prosser Memorandum, *supra* note 1, at 1.

5. Letter from Governor Evan Bayh to Carole Browner, EPA Administrator (Sept. 8, 1993).

6. *Id.* One newspaper editorial characterized the dispute between the Governor and the Indiana General Assembly as a “[g]ame of chicken on enforcement,” while urging that “[t]he Indiana General Assembly must enact better laws for environmental regulation.” Gary Post-Tribune, Sept. 14, 1993, at A11. Yet, the IDEM Commissioner provided detailed factual support for the administrative “realignment” necessitated by a massive state budget shortfall between anticipated revenue and anticipated expenditures:

This realignment is unavoidable because of the \$4.76 million deficit created when the legislature failed to approve fees for our [state run] water and solid and hazardous waste programs. We depended on these fees when we put together our 1993-95 budget, but a [recent] court decision struck the fees down. Because the legislature didn’t act, we cannot collect fees for our NPDES, RCRA or solid waste programs this year.

In addition to that, the State Budget Agency has ordered additional cuts to make up for the \$370 million deficit in the legislature’s budget. IDEM’s share of those cuts will be \$1 million in the first year and \$3 million in the second year of this biennium, making our total deficit \$7.76 million—more than 30 percent of our general fund budget in fiscal year 1995.

We cannot survive the ultimate \$7.76 million loss without eliminating some of our programs or returning them to the federal government. You know IDEM is stretched too thin already, and that we are constantly criticized because we cannot meet the public’s

Although not without doubt, it is reasonable to assume that, in all probability, a budgetary accommodation will be reached in 1994 between the Governor and the Indiana General Assembly that will allow Indiana to “maintain primacy”⁷ over the NPDES and RCRA programs and to halt the state turnback of its federally-delegated environmental powers. Of more lasting importance, however, is how this case study illustrates the increasing complexity in the continuing evolution of the “cooperative” federalism model of American environmental law.⁸ Indeed, Indiana’s environmental regulatory turnback gambit of 1993 might be a portent for a new game strategy by other states to balance their tight budgets by turning certain environmental responsibilities back to the federal government.⁹

expectations. I can no longer ask you to do more with less. It’s not good for Indiana’s environment and it’s not fair to IDEM employees who want to be effective in their jobs. Prosser Memorandum, *supra* note 1, at 1. See also INDIANA DEPARTMENT OF ENVIRONMENTAL MANAGEMENT, IDEM FACT SHEET (July 1993) which provided further details of IDEM’s funding dilemma:

IDEM is funded by a combination of state, federal and dedicated funds (fees). During the past few years, environmental agencies across the country have seen a dramatic shift in funding. State and federal funds are making up a smaller percentage of their operating budgets, and the use of dedicated funds is growing.

Three related trends are behind this. First, federal funds are decreasing. Five years ago, the federal government supplied 44 percent of IDEM’s operating budget. In 1993-95, federal funds will account for only 19 percent of the agency’s budget.

Second, although state general funds have increased, their proportion of the agency budget has decreased. Third, due to increased environmental awareness, Congress and state lawmakers have given IDEM 57 new programs to implement—programs that often come without adequate funding.

Those realities have caused IDEM and many other state agencies to increase their reliance on fees to fund environmental programs.

Previously, each Indiana facility paid only \$150 per year for a permit. IDEM established fees to cover the actual costs of issuing environmental permits and monitoring for compliance.

However, a lawsuit by 11 companies challenged our water fees, and a judge ruled in January that the fees were invalid. The ruling also placed our solid and hazardous waste fees in question. We asked for a legislative remedy, but a possible compromise was killed in the General Assembly’s final days.

Id. at 2-3.

7. See *supra* notes 5-6 and accompanying text. See also *Bayh Seeks Environmental Funding*, INDPLS. STAR, Oct. 31, 1993, at B5. (Describes how Governor Bayh wants state legislation passed that would restore IDEM’s authority to charge increased water pollution permits while pointing out the possible adverse consequences to businesses in Indiana—through long waiting times to receive environmental permits. Discusses a task force of business, environmental, and government leaders assembled by Governor Bayh to resolve the problem).

8. See generally 1 WILLIAM H. RODGERS, JR., ENVIRONMENTAL LAW: AIR AND WATER at v. (1986) (the concept of evolution “tends to surface regularly, probably because the facts, players, policies, rules, and strategies [of environmental regulation] invariably drift and move when plotted over time”).

9. Professor Rodgers has pointed out that, in the realm of environmental law and policy, legal change is likely to produce future legal changes as the current legal regime “produces its own

dissatisfactions, gives rise to new 'gaps' to be filled, and creates its own demands for more regulation." Robert F. Blomquist, *The Beauty of Complexity* (Book Review Essay), 39 HAST. L. J. 555, 568 (1988) (quoting RODGERS, *supra* note 8, § 1.3, at 17).

A turnback strategy by the states, however, would be against the traditional wisdom that return of federally-delegated environmental authority would be detrimental to the long-term interests of the states' environments and business interests. This line of argument was articulated in a recent white paper prepared by the non-profit Indiana Environmental Institute, Inc., which opposed Indiana's turnback strategy. See, INDIANA ENVIRONMENTAL INSTITUTE, INC., WILLIAM BERANEK, JR., KEEP INDIANA ENVIRONMENTAL PROTECTION PROGRAMS IN INDIANA (July 19, 1993). Among the salient points in the Indiana Environmental Institute's analysis were the following:

Such indiscriminate permanent staff reduction of IDEM would be an option with dire consequence for environmental protection and for economic vitality in Indiana. This would be akin to the U.S. Congress giving legislative authority back to the English Parliament. Not only do we lose the invaluable years of understanding of state environmental issues by our Indiana civil servants, we greatly reduce access to the decisionmaking about our environmental concerns.

* * *

What is now done with many state staff would be accomplished by a much smaller number in a distant federal bureaucracy. What is now done with understanding of the local concerns of citizens, the regulated, and environmentalists, will be done by-the-federal-book with no time or inclination for fitting the spirit of the law to the particular Indiana circumstance. Access to government by most Indiana stakeholders would be greatly reduced. For Indiana to request the program back later would be very expensive. The entire program staff would need to be hired, trained and implementing a parallel state program adequately before EPA could redelegate authority.

Traditionally, in environmental programs the federal EPA operates best at overseeing the state program and paying attention to the hotspots, not performing routine compliance. EPA is best when 1) serving as ombudsman to look into the situation when the state agency is not responsive enough, 2) handling the really big cases needing federal clout or expertise or 3) handling the technically complex appeals.

A state government is best at the remaining ninety percent of the regulatory responsibility: talking with citizens; permitting, inspecting and enforcing the regulated; relating to local governments; communicating with the state legislature; monitoring the environment; day-to-day educating of the regulated and the citizens; and setting and tackling state priorities.

Short-term budgetary gain of removing the state from parts of the environmental protection business would be our long-term loss as a state. Lost would be institutional memory of state staff who know our situation. The sum of knowledge of those who know how to make the complex system work under trying conditions in Indiana is invaluable. Lost would be access to decision-makers. The only way for the federal government to recreate part of the access would be to recreate the staff positions (funded by all of us through the federal government). The federal government itself is underfunded and under great pressure to reduce its size. Expecting the EPA to do what IDEM could do is unrealistic.

Id. at 1-2.

Yet, as T.S. Eliot noted, "As we grow older, the world becomes stranger, its patterns more complicated." T.S. ELIOT, EAST COKER, PART V (1940). From the standpoint of game theory, would not a state be pursuing a rational, gain-maximizing strategy by giving back to EPA, in a "tit-for-tat" approach, some of the enforcement headaches dished out by EPA in the first place without adequate federal funding? See generally RICHARD M. AXELROD, THE EVOLUTION OF COOPERATION (1984) (demonstrating, by computer simulation, the validity of a "tit-for-tat" strategy in maximizing long-

This Article is divided into three major parts. In light of the novelty and legal uncertainty of Indiana's turnback approach—the first voluntary state turnback of federally-delegated environmental powers in the nation—and the plausibility that other states may choose to follow Indiana's lead,¹⁰ considerable space in the first section is devoted to an analysis of the mechanics, timing, and criteria in the federally-defined process of a state's voluntary return of federally-delegated water and hazardous waste environmental regulatory powers. The second section discusses the key Indiana environmental and natural resources statutes enacted into law during 1993 by the General Assembly and Governor Bayh. Finally, the Article concludes by analyzing selective state judicial decisions that interpret Indiana environmental and natural resources law and important federal court opinions that address specific Indiana environmental disputes.¹¹

term gain).

10. I use the word "lead" with a certain sense of irony. From one perspective, Indiana *has* demonstrated national leadership. Regarding environmental law and policy, *see, e.g.*, Public Law No. 105-190, IND. CODE § 13-9-1-1 *et. seq.*, which is considered one of the best state pollution prevention statutes in the country. Blomquist, *supra* note 3, at 809-12. Viewed from another perspective, however, Indiana has become one of the nation's laggards in environmental quality and commitment. As demonstrated in two recent national comparison studies of environmental measurements, Indiana is deficient in many measures of environmental quality and commitment.

According to BOB HALL & MARY LEE KERR, 1991-1992 GREEN INDEX: A STATE-BY-STATE GUIDE TO THE NATION'S ENVIRONMENTAL HEALTH (1991), Indiana ranks 50th (or worst) out of the 50 states in "toxics released to land per square mile," 50th in "release of toxins causing birth defects," 49th in "sulfur dioxide emissions" and 47th in "acid rain." *Id.* at 12. Indiana's "Final Green Index" ranking, according to this publication, is 43rd out of 50 states. *Id.* at 3. "The Green Index is a set of 256 indicators that measure and rank each state's environmental health. Taken together, these indicators describe the condition of things as they are, as well as policies and political leadership in place to make things better." *Id.* at 1.

According to WORLD RESOURCES INSTITUTE, THE 1993 INFORMATION PLEASE ENVIRONMENTAL ALMANAC (1993), Indiana ranks as a state with some of the highest "pollutant releases" in the United States. In this regard, Indiana ranks 4th in "toxics released" (84,400 tons); 8th in "per capita toxics released" (30.45 pounds); 9th in "toxics transferred" (21,400 tons); 7th in "greenhouse gas emissions (CO₂ equivalent)" (217.1 million tons); and 5th in "per capita greenhouse gas emissions" (39.07 tons). *Id.* at 245. Moreover, according to this source of information, Indiana ranks 47th in its "budget spent on environmental and natural resources" (0.68% of total state budget); 49th in "per capita budget spent on environmental and natural resources" (\$9.50); 40th in "per capita budget" for solid waste (\$.02); and 47th in "per capita budget" for water quality (\$0.59).

11. Environmental rulemaking, a critical part of the developing environmental law in Indiana and at the federal level, is beyond the scope of this Article. However, because of its importance, the recent EPA Water Quality Guidance for the Great Lakes System ("Guidance") is briefly mentioned herein. See generally 58 Fed. Reg. 20802-01 (1993). According to the summary of the proposed rule, EPA contends that:

This guidance, once finalized, will establish minimum water quality standards, antidegradation policies, and implementation procedures for waters within the Great Lakes System in the states of New York, Pennsylvania, Ohio, Indiana, Illinois, Minnesota, Wisconsin, and Michigan, including the waters within the jurisdiction of Indian tribes. [The Guidance] proposal also is intended to satisfy the requirements of Section 118(c)(7)(C) of the Clean Water Act that EPA publish information concerning the public

I. NPDES AND RCRA STATE PROGRAM
WITHDRAWALS — MECHANICS AND IMPLICATIONS

A. *The NPDES Program*

In conformance with the model of cooperative federalism, "the NPDES program anticipated initial federal administration and a gradual turnover of authority to states demonstrating a capacity to administer their own programs."¹² During the 70s and 80s, states, including Indiana, demonstrated eagerness to administer the NPDES program within their borders by obtaining approval from the EPA.¹³ In order to obtain EPA's approval, Indiana and other applicant states had to submit a proposed state-administered NPDES regulatory program together with a statement from the State Attorney General "that the laws of such state . . . provide adequate authority to carry out the described program."¹⁴ Federal approval of state NPDES program administration was easy to obtain;

health and environmental consequences of contaminants in Great Lakes sediment and that the information include specific numerical limits to protect health, aquatic life, and wildlife from the bioaccumulation of toxins.

The proposed Guidance specifies numeric criteria for selected pollutants to protect aquatic life, wildlife and human health within the Great Lakes System and methodologies to derive numeric criteria for additional pollutants discharged to these waters. The proposed Guidance also contains specific implementation procedures to translate the proposed ambient water quality criteria into enforceable controls on discharges of pollutants, and a proposed antidegradation policy for the Great Lakes System.

The Great Lakes States and Tribes must adopt water quality standards, antidegradation policies, and implementation procedures for waters within the Great Lakes System which are consistent with the final Guidance. If a Great Lakes State or Tribe fails to adopt consistent provisions within two years of EPA's publication of the final Guidance, EPA will promulgate such provisions within the same two-year period.

Id. at 20802.

Legal developments regarding environmental implications of property transfers is beyond the scope of this Article. *See generally* THE LAW AND STRATEGY OF ENVIRONMENTAL TRANSACTIONS AND COMPLIANCE IN THE GREAT LAKES STATES (Robert F. Blomquist, General Ed. 1995) (forthcoming) (Lawyers Cooperative Publishing Co.).

12. RODGERS (Vol. 2), *supra* note 8, at 373. *See generally* 33 U.S.C. § 1342(c) (1993).

13. RODGERS (Vol. 2), *supra* note 8, at 373.

14. 33 U.S.C. § 1342(b) (1993).

The "adequate authority" covers the spectrum of pollution regulatory powers, including permit issuance, enforcement, public participation, discharge of pollutants into treatment works, and the like. The regulations add a good deal of gloss, including particulars on the memorandum of agreement between the State and the Regional administrator. This document is expected to contain provisions on "classes and categories" of permit applications and proposed permits submitted for EPA review, compliance monitoring, and [other] specifications. . . .

RODGERS (Vol. 2), *supra* note 8, at 377-78 (footnote omitted). *See generally* 40 C.F.R. § 123.24 (1985).

some critics “would say that federal power was handed off with nobody there to receive it.”¹⁵

“Many of the same forces that [led] to eventual state program approvals create formidable obstacles to [involuntary] takebacks of authority”¹⁶ by EPA. Indeed, an involuntary “takeback” of federally-delegated NPDES regulatory power from a state by EPA, as opposed to a voluntary “turnback” by a state to EPA, is the predominant paradigm under federal law. However, according to an authority on the subject, an involuntary EPA “takeback” was contemplated to be a rare event:

The procedures for withdrawal of state programs would be suitable for the Nuremberg trials, and will be invoked only upon epochal occasions. A withdrawal of authority, or even the suggestion of it, is so demeaning and disruptive as to be eagerly avoided by both governments that are attuned to the necessities of coexistence. If a withdrawal of authority ever happens, it is likely to be a “media” event chastising the named offender in the interests of a broader program of reform. It is true also that there are lesser alternatives to withdrawal that may accommodate the full range of federal concerns about poor state performance—individual permit reviews. It is in this context that the “adequacy” of state performance will be continuously and concretely judged.¹⁷

For similar reasons—including programmatic disruption, institutional embarrassment, and availability of less radical alternatives—it would seem that a state’s voluntary turnback and EPA withdrawal of previously delegated NPDES regulatory powers also would be unlikely. Yet, the governor of Indiana, faced with industry hostility toward higher permit fees, a fiscal shortfall in the state budget, an unreceptive state legislature, and burgeoning underfunded federal mandates in numerous policy areas, undertook to start what may grow into a contrarian national trend by similarly-situated state governors trying to reconcile the regulatory dilemma of the nineties: voter opposition to higher taxes juxtaposed with exploding and oppressive federal regulatory mandates.¹⁸

15. RODGERS (Vol. 2), *supra* note 8, at 379.

16. *Id.*

17. *Id.* (footnotes omitted). *Cf.*, *Citizens for a Better Environment v. E.P.A.*, 596 F.2d 720 (7th Cir. 1979) (judicial invalidation of EPA approval of the Illinois NPDES program without prior promulgation of citizen participation procedures); *Central Hudson Gas & Elec. Corp. v. United States EPA*, 587 F.2d 549 (2d Cir. 1978) (within the context of a jurisdictional question, held that federal approval of a state’s NPDES authority does not deprive EPA of the power to adjudicate NPDES proceedings pending before it).

18. *Cf.* Thomas P. Wyman, *Bayh: Clinton Interested in Indiana “Streamlining” Effort*, GARY POST-TRIBUNE, Nov. 12, 1993, at B9 (Indiana asking federal government for permission to experiment with a plan to cut back the levels of bureaucracy and red tape people face in the state, involving 199 federal programs from school milk programs to grants for disabled toddlers).

The three-part procedure for Indiana's voluntary turnback of NPDES regulatory powers is delineated, in elaborate detail, in the *Code of Federal Regulations*.¹⁹ First, "[t]he State shall give the Administrator [of the EPA] 180 days notice of the proposed transfer and shall submit a plan for the orderly transfer of all relevant program information not in the possession of EPA (such as permits, permit files, compliance files, reports, permit applications) which are necessary for EPA to administer the program."²⁰ While this provision would allow the electronic transfer of computer databases between state and federal offices via an "information highway," the current reality of NPDES recordkeeping in the states would probably necessitate shipment of cartons of paper reports, and mailing of taped parcel packages of state records, creating a troublesome storage problem for federal officials.

The second federal procedure governing Indiana's voluntary transfer of NPDES regulatory power to the EPA requires that "[w]ithin 60 days of receiving the notice and transfer plan, the Administrator shall evaluate the State's transfer plan and shall identify any additional information needed by the Federal government for program administration and/or identify any other deficiencies in the plan."²¹ Third, according to the EPA regulation, "[a]t least 30 days before the transfer is to occur the Administrator shall publish notice of the transfer in the *Federal Register* and in enough of the largest newspapers in the State to provide Statewide coverage, and shall mail notice to all permit holders, permit applicants, other regulated persons and other interested persons on appropriate EPA and state mailing lists."²² One can almost picture an earnest federal official, under these provisions, trying to figure out the newspaper circulation for various newspapers in Indiana and determining "appropriate" versus "inappropriate" mailing lists.

Given the ultimate compliance by Indiana, or another state choosing to turn back NPDES regulatory power to EPA sometime in the future, with the notice and information transfer procedures, and the EPA's fulfillment of the publication of transfer standard, the relevant *Code of Federal Regulations* language implies state *entitlement* to effectuate the transfer. This conclusion, however, is uncertain in light of an analogous EPA regulation addressing "criteria for withdrawal of State Programs on an involuntary basis."²³ This regulation is phrased in discretionary, as opposed to mandatory, language in the following fashion:

- (a) The Administrator may withdraw program approval when a State program no longer complies with the requirements of this part, and the

19. 40 C.F.R. § 123.64 (1992). It should be noted, however, that the regulations provide for a "fudge factor" by allowing the transferring State to take action "in such other manner as may be agreed upon with the Administrator." *Id.* at 123.64(a).

20. *Id.* at § 123.64(a)(1).

21. *Id.* at § 123.64(a)(2).

22. *Id.* at § 123.64(a)(3).

23. 40 C.F.R. § 123.63.

State fails to take corrective action. Such circumstances include the following:

(1) Where the State's legal authority no longer meets the requirements of this part, including:

(i) Failure of the State to promulgate or enact new authorities when necessary; or

(ii) Action by a State legislature or court striking down or limiting State authorities.

(2) Where the operation of the State program fails to comply with the requirements of this part, including:

(i) Failure to exercise control over activities required to be regulated under this part, including failure to issue permits;

(ii) Repeated issuance of permits which do not conform to the requirements of this part; or

(iii) Failure to comply with the public participation requirements of this part.

(3) Where the State's enforcement program fails to comply with the requirements of this part, including:

(i) Failure to act on violations of permits or other program requirements;

(ii) Failure to seek adequate enforcement penalties or to collect administrative fines when imposed; or

(iii) Failure to inspect and monitor activities subject to regulation.

(4) Where the State program fails to comply with the terms of the Memorandum of Agreement required under § 123.24.

(5) Where the State fails to develop an adequate regulatory program for developing water quality-based effluent limits in NPDES permits.²⁴

24. *Id.*

However, according to the Supreme Court of the United States in *New York v. United States*,²⁵ the Tenth Amendment of the Federal Constitution prohibits federal use of the States “as implements of regulation.” Thus, it is unlikely that the EPA would pass constitutional muster if it were to interpret the Code of Federal Regulations’ criteria for withdrawal of state programs as allowing the Administrator to decide not to allow Indiana to voluntarily turn back its federally delegated NPDES regulatory responsibilities.

25. 112 S. Ct. 2408 (1992). *New York v. United States* involved three provisions of the Low-Level Radioactive Waste Policy Amendments Act of 1985. The statute was designed to create sanctions against states that refused to deal with low-level radioactive wastes that they produced. The statute provided the states various incentives to tackle this issue. First, states with low-level radioactive sites were authorized to charge gradually increasing fees for waste from states that had not authorized low-level radioactive sites within their borders. Second, states that missed certain deadlines were authorized by Congress to charge higher surcharges and, eventually, denied access in other states’ disposal facilities altogether. Third, the so-called “take title” provision essentially directed states that eventually they would literally own the low-level radioactive wastes produced within their borders if they didn’t cooperate and provide for some type of storage within their territory.

The State of New York did not join a regional compact. It complied with the initial requirements of the statute by enacting legislation providing for the siting of a facility within its borders. But, residents of two counties containing potential sites in New York opposed the state’s choice of location—a classic NIMBY (“Not in My Back Yard”) response. Fearing that it could not comply with the statutory deadlines, New York and these two counties brought suit, contending that the statute was inconsistent with the Tenth Amendment and with the Guarantee Clause of Article IV of the United States Constitution. Justice O’Connor, writing for a majority of the Court, found that “take title” provisions violative of the Tenth Amendment as “infringing upon the core of state sovereignty reserved” by the amendment. *Id.* at 2429. In the alternative, the Court indicated that congressional power to direct the states to regulate in this fashion probably was “outside Congress’ enumerated powers.” *Id.* As noted by Justice O’Connor, “[n]o matter how powerful the federal interest involved, the Constitution simply does not give Congress the authority to require the State to regulate. The Constitution instead gives Congress the authority to regulate matters directly and to pre-empt contrary state regulation. Where a federal interest is sufficiently strong to cause Congress to legislate, it must do so directly; it may not conscript state governments as its agents.” *Id.*

See also *Board of Natural Resources of Washington v. Brown*, 992 F.2d 937 (9th Cir. 1993). In that case, the State of Washington challenged portions of the 1990 Forest Resources Conservation and Shortage Relief Act, 16 U.S.C. §§ 620-620(j), which restricts the export of unprocessed timber from federal and state public lands in western states. The purpose of the restrictions, passed by Congress, was to preserve jobs at domestic sawmills in the face of reduced cutting an old-growth forest, due in part to efforts to protect the habitat of the Western Spotted Owl. The statute provides that “[e]ach state shall determine the species, grade, and geographic origin of unprocessed timber to be prohibited from export *** and shall administer such prohibitions consistent with the intent of Sections 620 to 620(j),” and that “the Governor *** shall *** issue regulations to carry out the purposes” of the Act. The Ninth Circuit held that these provisions violate the Tenth Amendment as interpreted in *New York v. United States*, 992 F.2d at 947.

B. The RCRA Program

Professor William H. Rodgers, Jr. provides an interesting backdrop to federal-state interaction in administering the RCRA hazardous waste program by observing:

RCRA is stuck firmly on the “partnership” mode—some would say the statute is committed to a “partnership” that can’t possibly work. Indeed, only one of five basic EPA roles under RCRA could be said to be fully compatible with the “cooperative spirit” of a partnership. This role consists of a variety of support and advice-giving activities that include “the provision of grants, technical assistance and counsel to aid [the States] in solving both generic and specific hazardous waste problems.” Four other statutory roles place EPA prominently in the position of a federal father—as the rulemaker that lays down the minimum standards and the program regulations; as the regulator responsible for acting in states choosing not to develop their own programs; as the overseer with powers to say “yes,” “no,” and “maybe” to state requests for program authorization; and as the enforcer with the authority to initiate enforcement actions even in states with authorized programs. One must remember, of course, that efficiency and consistency are not legislative requirements.²⁶

The dynamics of federal authorization of state RCRA programs and withdrawal of authorization of these programs is analogous to the applicable standards regarding state NPDES programs under the Clean Water Act.²⁷ As explained by Professor Rodgers:

[A]uthorization is very much a one-way street that is granted but almost never withdrawn. [RCRA] gives the Administrator power to withdraw authorization after a “public hearing” and a finding that a State “is not administering and enforcing a program authorized under this section in accordance with requirements of this section.” This takeaway provision closely parallels those found in other environmental statutes. EPA is strongly constrained from invoking blunderbuss sanctions of this sort

26. WILLIAM H. RODGERS, JR., ENVIRONMENTAL LAW: HAZARDOUS WASTES AND SUBSTANCES (Vol. 4) (1992) 253 (footnotes omitted). The RCRA authorization process is properly characterized as involving a “crazy-quilt pattern of authorization” by virtue of the “‘non-HSWA’, ‘pre-HSWA’, or ‘base’ RCRA programs where new rules took effect only in non-authorized States and in authorized States only through State adoption of equivalent requirements and the ‘HSWA’ RCRA Programs where the new federal rules are effective immediately in all States.” *Id.* at 260. “HSWA” stands for the Hazardous and Solid Waste Amendments of 1984, Pub. L. No. 98-616, § 601(a), 98 Stat. 3221, 3277 (Nov. 8, 1984), enacting Sections 9001-9010 of the Solid Waste Disposal Act, 42 U.S.C. §§ 6991-6991i.

27. See *supra* notes 12-25 and accompanying text.

out of a reluctance to provoke political retaliation or to burn bridges if there is any hope of salvaging the relationship.²⁸

Only one instance of an attempt by EPA to involuntarily withdraw a previously-delegated state RCRA authorization—involving the State of North Carolina—exists to date. That single instance, which ultimately resulted in a determination by EPA not to withdraw North Carolina's RCRA authorization, has been characterized as "an unusual and solemn event in the history of modern pollution law."²⁹ Section 3006(e) of RCRA³⁰ gives the EPA Administrator the power to withdraw authorization of a state program for a state's failure to meet the congressionally-mandated requirements of RCRA. Yet, in the past, "[e]xercise of this blunderbuss declaration of incapacity [has been] hedged by a number of procedural restrictions (public hearing, a ninety-day grace period for correcting identified deficiencies, written findings), and all but obliterated by the political realities and institutional disincentives that dissuade EPA from announcing to the world that a particular state program is an irretrievable failure."³¹

The three-part *Code of Federal Regulations* procedure for Indiana's voluntary turnback of RCRA regulatory powers to EPA which involves notice, information transfer, and publication,³² is identical to the previously discussed NPDES program voluntary turnback provisions under the Clean Water Act.³³ Moreover, with one minor exception, the analogous criteria for involuntarily withdrawing approval of a state's RCRA program by EPA³⁴ is also identical to the NPDES involuntary withdrawal criteria.³⁵

The same constitutional issues implicated in a potential EPA decision refusing to withdraw Indiana's voluntary attempt to turn back its NPDES regulatory authorization under the Clean Water Act³⁶ would also be involved with regard to Indiana's voluntary attempt to turn back its RCRA regulatory

28. RODGERS (Vol. 4), *supra* note 26, at 261-62 (footnote omitted).

29. *Id.* See *Hazardous Waste Treatment Council v. Reilly*, 938 F.2d 1390 (D.C. Cir. 1991) (holding that EPA properly decided not to withdraw authorization of North Carolina's program because the state law did not effect a statewide ban on hazardous waste facility siting and treatment options within the State). See also Comment, *The EPA-North Carolina Dispute: The Right of States to Pass Stricter Laws Under the Resource Conservation and Recovery Act*, 8 VA. J. NAT. RES. L. 171 (1988).

30. 42 U.S.C. § 6926(e) (1993).

31. RODGERS (Vol. 4), *supra* note 26, at 278 (footnote omitted).

32. 40 C.F.R. § 271.23 (1992).

33. See *supra* notes 12-25 and accompanying text.

34. 40 C.F.R. § 271.22 (1992).

35. See *supra* notes 12-25 and accompanying text. The one exception is that the RCRA withdrawal criteria omit, for obvious reasons, the NPDES withdrawal criterion involving a state's failure to develop "an adequate regulatory program for developing water quality-based effluent limits in NPDES permits." See 40 C.F.R. § 123.63(a)(5).

36. See *supra* note 25 and accompanying text.

authorization. In short, the courts would probably interpret a negative decision by EPA, refusing to withdraw RCRA authority notwithstanding the Governor's voluntary request, to be violative of Indiana's "core of state sovereignty" protected by the Tenth Amendment.³⁷

II. KEY INDIANA ENVIRONMENTAL AND NATURAL RESOURCES LEGISLATION, 1993

Indiana's 1993 First Regular Session of the 108th General Assembly enacted a few significant bills pertaining to the environment. These bills addressed the following four issues: (a) general regulatory oversight; (b) environmental rulemaking reform; (c) pollution prevention policy; and (d) state implementation of the federal Clean Air Act Amendments.³⁸ The General Assembly also passed a variety of less important environmental and natural resource bills during 1993.³⁹

37. *Id.*

38. *See infra* notes 40-75 and accompanying text.

39. Less important environmental and natural resources legislation passed during 1993 includes the following items. Indiana House Enrolled Act No. 1427, Pub. L. No. 32-1993 (codified at IND. CODE §§ 4-13.4-4-8, 13-7-23-6, 13-7-23-10.3, 13-7-23-11, 13-7-23-12, 13-7-23-13, 13-7-23-17, 13-7-23-18, 13-7-23-19, 13-7-23.2-9.3, & 36-1-9-15 (Supp. 1993)) expands the authority of IDEM in dealing with waste tires. The legislation also requires that before purchasing or procuring waste tires, a purchasing agent must include retread tires in the specifications. Moreover, the disposal of whole waste tires at a solid waste landfill is banned, under this law, after July 1, 1995.

Indiana Senate Enrolled Act No. 295, Pub. L. No. 99-1993 (amending IND. CODE § 8-2.1-18-36) (addresses motor carrier safety, particularly dealing with cargo tanks used to transport hazardous materials. It also sets out requirements for the maintenance, recondition, repair, inspection and testing of cargo tanks).

Indiana Senate Enrolled Act No. 632, Pub. L. No. 165-1993 (amending IND. CODE § 13-7-35 (Supp. 1993)) provides further details of regulation of composting activities resulting from landscaping maintenance and land-clearing projects. However, two exceptions from these regulations are provided by the legislation: (1) those operations that process less than 2,000 pounds of vegetative matter a year, and (2) the temporary storage of vegetative matter where composting is merely incidental to temporary storage.

Indiana House Enrolled Act No. 1078, Pub. L. No. 149-1993 (codified at IND. CODE § 13-1-1.2 (Supp. 1993)) permits an individual to openly burn certain vegetation under prescribed conditions.

Indiana Senate Enrolled Act No. 349, Pub. L. No. 150-1993 (codified at IND. CODE § 13-1-12-8, 13-1-12-9 & 13-7-10-6 (Supp. 1993)) prohibits the Solid Waste Management Board from adopting rules to prohibit, encumber, or arbitrarily restrict vertical expansions of existing permitted landfills. The legislation also requires the Board to adopt rules requiring the applicant for a vertical expansion to submit environmental assessments as part of the vertical expansion application.

Indiana Senate Enrolled Act No. 394, Pub. L. No. 160-1993 (codified at IND. CODE §§ 13-7-8.5-7, 13-7-8.9-24 & 13-7-10-1.5) requires the Solid Waste Management Board to adopt rules allowing a treatment, storage, or disposal facility to reject partial shipments of solid wastes under certain circumstances, while also specifying that new voluntary cleanup provision is intended to provide an alternative procedure to ensure compliance.

Indiana Senate Enrolled Act No. 368, Pub. L. No. 152-1993 (amending IND. CODE § 13-2-6.1 (Supp. 1993)) modifies water resource management standards to mandate the development of a water

A. General Regulatory Oversight

HEA 1646⁴⁰ establishes an Administrative Rules Oversight Committee,

shortage plan by IDNR. The legislation also establishes a water resources study committee to make policy recommendations concerning surface and groundwater in the state.

Indiana Senate Enrolled Act No. 367, Pub. L. No. 153-1993 (codified at IND. CODE § 13-2-11.1-3 and 13-2-15-1 (Supp. 1993)) mandates that a permit—required for activities which lower the water level of any fresh water lake—be posted at the activity site until the pertinent activity is completed.

Indiana Senate Enrolled Act No. 249, Pub. L. No. 154-1993 (codified at IND. CODE § 13-2-22-13, 36-2-16-5, 36-7-4-222.5, 36-7-4-223, 36-9-27-26.5, 36-9-27-45.5, 36-9-27-71, *et al.* (Supp. 1993)) amends the general permit requirements under the Flood Control Act.

Indiana Senate Enrolled Act No. 649, Pub. L. No. 161-1993 (codified at IND. CODE §§ 13-7-8.5-11.3 & 13-7-16.5-9) adds more requirements for a permit for the construction or operation of a hazardous waste facility used to destroy or treat PCBs. A permit may not be issued for the construction or operation of a hazardous waste facility or an ancillary facility unless (1) an applicant has demonstrated that the destruction or treatment technology to be used at the proposed facility has been in operation at an equivalent facility for a time sufficient to demonstrate that 99.9999% of the PCBs processed are destroyed and (2) that a hazardous substance has not been released into another solid, liquid, or gaseous substance by the destruction or treatment.

Indiana Senate Enrolled Act No. 180, Pub. L. No. 155-1993 (codified at IND. CODE § 13-2-22-13, 13-2-22-13.2, 13-2-22-13.3 & 13-2-22-13.4 (Supp. 1993)) provides certain exceptions and modifications to the general requirement in existing legislation that an applicant must obtain a permit from the IDNR before constructing or reconstructing a residence that is located in a floodway.

Indiana House Enrolled Act No. 1503, Pub. L. No. 158-1993 (codified at IND. CODE § 13-7-2-15 *et al.* (Supp. 1993)) addresses various aspects of real property transactions that impact environmental concerns. For example, it requires that IDEM give thirty days' notice regarding its intent to file a lien to recover costs involved in an IDEM response action.

Indiana Senate Enrolled Act No. 195, Pub. L. No. 159-1993 (codified at IND. CODE § 13-7-5-3.3 (Supp. 1993)) requires IDEM property inspectors to give property owners an oral report about any inspection undertaken by IDEM, including any potential violations of a law or a permit issued by IDEM.

Indiana Senate Enrolled Act No. 609, Pub. L. No. 169-1993 (codified at IND. CODE § 13-7-13-3 (Supp. 1993)) eliminates criminal provisions for negligent violation of an environmental statute, rule, permit or order.

Indiana Senate Enrolled Act No. 360, Pub. L. No. 162-1993 (codified at IND. CODE § 13-7-10-2 (Supp. 1993)) requires that IDEM inform National Pollutant Discharge Elimination System (NPDES) applicants, seeking permits to discharge into a stream, that the county drainage board must also approve the application when the stream is a "regulated drain."

Indiana House Enrolled Act No. 1433, Pub. L. No. 163-1993 (amending IND. CODE § 13-7-10.2-1 (Supp. 1993)) amends the "good character" requirements for obtaining a solid or hazardous waste permit from IDEM. Prior law required that a permit applicant must submit a disclosure statement describing civil, administrative, and criminal complaints for environmental violations for the five years preceding the date of application. Pub. L. No. 163 limits the definition of "applicant" to the following: "an individual or a business that receives, for commercial purposes, solid or hazardous waste generated off-site for storage, treatment, processing, or disposal, but does not include an individual or a business that generates solid or hazardous waste, and stores, treats, processes, or disposes of the solid or hazardous waste at a site that is limited to its storage, treatment, processing, or disposal." The legislation makes the revised definition of "applicant" apply retroactively to all permit applications filed after March 19, 1990.

40. Indiana House Enrolled Act No. 1646, Pub. L. No. 12-1993 (portions codified at IND. CODE §§ 2-5-18 & 4-22-2-29 (amending current law), 4-22-2-32 (amending current law) (Supp.

consisting of eight members of the Indiana General Assembly, to receive and review complaints filed by interested persons regarding a rule or practice of a state agency. The legislation authorizes the Committee to review an agency rule, agency practice, or failure by an agency to adopt a rule. Moreover, the Committee is authorized to recommend that a rule be modified, repealed, or adapted.⁴¹

An interesting provision in the legislation contemplates that the Committee will function like an administrative ombudsman between the numerous Indiana state agencies and the General Assembly. The following language is pertinent: "[w]hen appropriate, the committee shall prepare and arrange for the introduction of a bill to clarify the intent of the General Assembly when the General Assembly enacts a law or to correct the misapplication of a law by an agency."⁴² Moreover, sensitive to recent conservative trends in Takings jurisprudence,⁴³ the legislature establishes a non-adjudicative review process by the state Attorney General to consider whether rules adopted by state agencies "may constitute the taking of property without just compensation to an owner."⁴⁴

HEA 1646 represents an intriguing attempt by the General Assembly to exert more control over the diffuse administrative rulemaking apparatus that has become the heart of state government in Indiana.⁴⁵ However, despite its ostensibly noble intentions, the apparent defect with this legislation is the improbability that a small group of part-time state legislators will be able to keep abreast and stay conversant with the flood of regulations promulgated by various state agencies in multiple policy areas. One wonders, moreover, why the existing standing committees in the House and the Senate are incapable of keeping track of administrative developments under their respective jurisdictions through traditional oversight and review activities.

1993)).

41. *Id.* § 1(8)(A)-(C).

42. *Id.* § 1(8)(D).

43. *See generally*, ROGER W. FINDLEY & DANIEL A. FARBER, CASES AND MATERIALS ON ENVIRONMENTAL LAW 637-58 (1991) (collecting cases).

44. HEA No. 1646, *supra* note 40, § 3(b)(3).

45. *See generally* INDIANA CHAMBER OF COMMERCE, HERE IS YOUR INDIANA GOVERNMENT (29th ed. 1991) (describing the multiplicity of state agencies and boards embedded in Indiana state government).

B. *Environmental Rulemaking Reform*

SEA 302,⁴⁶ which focuses on environmental rulemaking, is interrelated to the general regulatory oversight provisions of HEA 1646.⁴⁷ The apparent motivation by the legislature in passing SEA 302 is its overarching concern for agency accountability regarding environmental policymaking. In this regard, SEA 302 requires greater public notice and involvement in shaping substantive rules passed by boards associated with IDEM (i.e., the Air Pollution Control Board, the Solid Waste Management Board, the Water Pollution Control Board, and the Financial Assurance Board).

Two important components of environmental rulemaking by Indiana's environmental boards have been changed by the new law. First, although "the law previously did not require public involvement before new rules were brought to a board for preliminary adoption," SEA 302 provides "new opportunities for the public to comment on the general subject matter of a proposed rule, and to offer amendments to draft rules prior to any action by a board."⁴⁸ Second, although prior law had "discouraged boards from making major amendments to a rule between its preliminary and final adoption" because of a legal standard that disallowed a final rule from substantially differing from the preliminary rule without being "reprocessed," the new legislation creates an ostensibly more flexible standard: "an amendment is acceptable," under SEA 302, "if it is a 'logical outgrowth'" of the proposed rule and any comments provided to the board at the board meeting/hearing at which the rule is finally adopted.⁴⁹

The "logical outgrowth" test may prove too indeterminate in its application to provide certainty and predictability to Indiana's state environmental boards. To paraphrase Justice Holmes on this point, the development of environmental

46. Indiana Senate Enrolled Act No. 302, Pub. L. No. 34-1993 (portions codified at IND. CODE §§ 4-22-2-13 (amending current law), 4-22-2-21 (amending current law), 4-22-2-31 (amending current law), 4-22-2-32 (amending current law), 4-22-2-37.1 (amending current law), 4-22-2-45, 13-7-7-1 (amending current law), 13-7-7-4 (amending current law), 13-7-7-5 (amending current law), 13-7-7.1, 13-7-20-35 (amending current law) (Supp. 1993)).

47. See *supra* notes 40-45 and accompanying text.

48. Joyce M. Martin, *Environmental Rulemaking in Indiana: It's a Whole New Ball Game!*, 3 INDIANA ENVIRONMENTAL COMPLIANCE UPDATE No. 8 at 1 (Aug. 1993).

49. *Id.* (quoting SEA 302, *supra* note 46, §§ 4 & 10). The specific language of the "logical outgrowth" test in the legislation is as follows:

For Rules adopted under IC 13-7-7.1, the Attorney General . . . shall determine whether the rule adopted by the Agency . . . is a logical outgrowth of the proposed rule as published . . . and of testimony presented at the Board Meeting. . . .

SEA 302, *supra* note 406, § 4.

In determining . . . whether an amendment is a logical outgrowth of the proposed rule and any comments, the Board shall consider whether the language of the proposed rule as published . . . and of any comments provided to the Board . . . fairly apprised interested persons of the specific subjects and issues contained in the amendment, and whether the interested parties were allowed an adequate opportunity to be heard by the Board.

Id. § 10.

policy through rulemaking is often not logic, but experience.⁵⁰ Moreover, in the complex world of environmental policymaking, where each rulemaking “produces its own dissatisfactions, gives rise to new ‘gaps’ to be filled, and creates its own demands for more regulation,”⁵¹ one observer’s respectable “outgrowth,” of regulatory developments flowing from prior hearings, documentary submissions, and staff analyses, may be another observer’s illegitimate “undergrowth” of regulatory actions said to take place from off-the-record discussions, non-disclosed documents, and confidential information sources. A better legislative means for achieving the goal of greater rulemaking flexibility for state environmental boards in making changes of preliminary rules at the final rulemaking stage, while providing maximum opportunity for public input, would have been to create a rebuttable presumption of validity subject only to a clear and convincing showing by an aggrieved party that no reasonable public notice of the likely contents of the final rule was made by the board at a stage of the rulemaking proceeding when the aggrieved party could have presented substantial information that may have modified the final outcome of the rule. This proposal, by clearly focusing on the decisionmaking and notice process, rather than a vague comparison test between the preliminary rule and the final rule,⁵² would be more likely to enhance agency flexibility, while protecting the public’s right to reasonable advance notice of proposed rulemaking than the standard posited by SEA 302.

C. Pollution Prevention Policy

Following what may be termed the “cloning model” of legislative creation of statutorily defined “committees” consisting exclusively of members of the General Assembly,⁵³ the General Assembly constituted a new Environmental Study Committee in HEA 1412.⁵⁴ Presumably, the General Assembly believed that a

50. See generally Oliver Wendell Holmes, Jr., *The Common Law and Other Writings* (Legal Classics: 1982) 1 (“The life of the law has not been logic: it has been experience”).

51. Blomquist, *supra* note 9, at 568.

52. SEA 302, *supra* note 46, § 10 attempts to link the “logical outgrowth” comparison test with a “due process” litmus test: whether the interested party was “fairly apprised” of the substance of the amendment and whether they were afforded an “adequate opportunity to be heard.” This linkage provides little help to the fundamental indeterminacy of the “logical outgrowth” comparison test.

53. See *supra* notes 40-46 and accompanying text (criticizing the need and desirability of a legislative Administrative Rules Oversight Committee consisting exclusively of members of the General Assembly).

54. Indiana House Enrolled Act No. 1412, Pub. L. No. 13-1993 (portions codified at IND. CODE §§ 2-5-22, 4-4-3-8 (amending current law), 4-4-10.9-11 (amending current law), 4-13.4-10, 5-17-6-20.1, 13-1-10.1, 13-7-8.7-13 (amending current law), 13-7-10-1.5 (amending current law), 13-7-13-2 (amending current law), 13-7-20-35 (amending current law), 13-9-1.1, 13-9-4-4 (amending current law), 13-9-4-12, 13-9-4-15, 13-9-5-3 (amending current law), 13-9-7-2, 13-9-7-3 (amending current law), 13-9.5-2-9.3 (amending current law), 13-9.5-2-11 (amending current law), 13-9.5-2-14, 13-9.5-3-1 (amending current law), 13-9.5-3.5-2 (amending current law), 13-9.5-7-1 (amending

committee of its own membership would be more desirable than the preexisting Environmental Policy Commission—consisting of a polyglot of representatives from government, environmentalists, and the general public—which was phased out of existence under the new legislation.⁵⁵ In addition to creating its new Environmental Study Committee, the legislature employed HEA 1412 to address an assortment of miscellaneous environmental concerns including development of recycled materials markets, mandatory government purchase requirements of recycled products,⁵⁶ preferences for recycled goods,⁵⁷ and modifications of the powers of solid waste districts.⁵⁸ From the standpoint of the “big picture,” however, the most important provisions of the new legislation amplified and expanded pollution prevention policy in Indiana.⁵⁹

Adding a new section to the Indiana Code, the General Assembly articulated a number of legislative facts on the need for pollution prevention that are worthy of complete reference:

(1) There are opportunities for industry to reduce:

(A) The use of harmful materials, including toxic industrial materials;

(B) The generation of environmental wastes and pollutants

through beneficial changes in production technologies, materials, operations, and products. These changes offer industry savings in reduced production, regulatory compliance, liability, and insurance costs and contribute to technology innovations and industrial competitiveness. Preventative practices applied at the point of production provide the most reliable and effective form of environmental, public health, and occupational health protection.

current law), 13-9.5-9-2 (amending current law), and 2-5-4 (repealed) (Supp. 1993)).

55. HEA 1412, *supra* note 54, §§ 34-35. The Environmental Policy Commission used to be responsible for the following:

This Commission was created in 1987 to consider long-term policy, making ongoing evaluation of the state's environmental program and [to] present its findings and recommendations in annual reports. Its staff is provided by the Legislative Services Agency. Membership consists of four legislators appointed by the President Pro Tempore of the Senate, four legislators appointed by the Speaker of the House and four lay persons appointed by the Governor (not more than two from the same political party in each case). Two of the Governor's appointments are to represent environmental interests and two are to represent economic interests.

INDIANA GOVERNMENT, *supra* note 45, at 8.

56. HEA 1412, *supra* note 54, § 4.

57. *Id.* § 5.

58. *Id.* § 26. See generally Blomquist, *supra* note 3, at 791-809.

59. HEA 1412, *supra* note 54, §§ 7, 15-23.

(2) The many opportunities for industrial pollution prevention are often not realized because existing rules and the industrial resources these rules require for compliance focus on the handling, storage, transportation, and management of waste and pollutants rather than pollution prevention. Rules existing before January 1, 1993 do not emphasize multimedia reduction in or elimination of:

(A) The generation of environmental wastes and pollutants; and

(B) The use of toxic or harmful industrial materials.

As a result, businesses need information, technical assistance, guidance and direction to overcome institutional and behavioral barriers that inhibit the adoption of pollution prevention practices.

Due to the substantial public benefit of pollution prevention policies and programs, the purpose of this [article] is to reduce as expeditiously as possible the use of toxic or harmful industrial materials and the generation of industrial wastes and pollutants at the point of production by means of pollution prevention.⁶⁰

The reference to “article” in the new legislative policy statement is to the Pollution Prevention & Industrial Safe Materials Act of 1990, which was codified at article 9 of Title 13 of the Indiana Code.⁶¹ While legislative attempts to employ precatory “policy findings” have often failed to impress judges,⁶² in light of the active interest of the Governor and the General Assembly in advancing pollution prevention—as discerned by creation of unique institutions like the Indiana Pollution Prevention and Safe Materials Institute and the Indiana Pollution Prevention Board⁶³—these legislative policy pronouncements seem destined to impact future judicial decisions and legal interpretations. This conclusion is buttressed by the new substantive “state environmental hierarchy” established in HEA 1412 as follows:

Sec. 1. The General Assembly recognizes that there are two (2) approaches to environmental protection:

(1) pollution prevention; or

60. *Id.* § 15 (codified at IND. CODE § 13-9-1.1).

61. IND. CODE § 13-9-1-1 *et. seq.* See generally Blomquist, *supra* note 3, at 809-12.

62. “Precatory” language is language that is “beseeching” or “entreating.” BALLENTINE’S LAW DICTIONARY 975 (1948).

63. See generally Blomquist, *supra* note 3, at 809-12.

- (2) waste management, which is also known as pollution control.

Sec. 2. Pollution Prevention consists of economically feasible practices that reduce, avoid, or eliminate the unnecessary use of harmful industrial materials and the generation of industrial wastes, pollutants, emissions, and discharges at the point of production. Pollution prevention practices are limited to the following:

- (1) Product reformulation.
- (2) Input substitution.
- (3) Equipment redesign.
- (4) Improved operations and procedures.
- (5) Closed loop, inprocess recycling.

Sec. 3. Waste management or pollution control consists of environmental protection practices employed after industrial wastes, pollutants, discharges, and emissions have been generated. Waste management or pollution control practices include the following:

- (1) Waste storage and waste transportation.
- (2) Waste treatment, including the following:
 - (A) Detoxification.
 - (B) Incineration.
 - (C) Biological treatment.
 - (D) Land disposal of waste.
 - (E) Conventional waste recycling.
 - (F) Burning waste as fuels.
 - (G) Dispersal of waste to air or water.
 - (H) Dewatering of waste.

Sec. 4. The General Assembly recognizes the following:

(1) Pollution prevention is:

(A) The most reliable and effective form of environmental protection; and

(B) The preferred approach to environmental protection.

(2) Wastes, pollutants, emissions, or discharges that have not been avoided or eliminated by means of pollution prevention at the point of production should be managed or controlled in a manner that has the least adverse impact on human health and the environment.⁶⁴

These new pollution prevention statutory provisions reflect a clear, concise, focused, and well-crafted articulation of the most efficient and effective means for achieving the challenge of “sustainable development” in Indiana. Indeed, “[t]he challenge for companies, governments and the public at large is, how can industry both produce products to meet needs and generate wealth in ways that do not degrade the environment” or exacerbate economic dislocation for some people.⁶⁵ The new overarching pollution prevention policy, now embedded in Title 13 of the Indiana Code, makes Indiana one of the most progressive state governments in the nation in terms of environmental protection theory. This new legislation provides Indiana with the potential to exercise a national leadership role as a catalyst “for the development of shared principles and for long-term industrial [pollution prevention] targets.”⁶⁶ Moreover, a miscellany of other enhancements to Indiana’s pollution prevention infrastructure and institutional framework, passed into law in 1993, reinforced this positive trend.⁶⁷

64. HEA 1412, *supra* note 54, § 7 (codified at IND. CODE § 13-1-10.1-1 to -4 (Supp. 1993)).

65. Nick Robins and Alex Trisoglio, *Restructuring Industry for Sustainable Development* in MAKING DEVELOPMENT SUSTAINABLE: REFINING INSTITUTIONS, POLICY, AND ECONOMICS (Johan Holmberg ed. 1992) 157.

66. *Id.* at 180.

67. See, e.g., HEA 1412, *supra* note 54, § 16 (codified at IND. CODE § 13-9-4-4 (refining the powers and responsibilities of the Indiana Pollution Prevention and Safe Materials Institute); § 17 (codified at IND. CODE § 13-9-4-12) (authorizing the Institute to “conduct and publish studies” regarding a wide assortment of national, state, and local pollution prevention policy issues), § 18 (codified at IND. CODE § 13-9-4-13) (directing the Institute to “identify problems encountered by businesses and governments attempting to implement multimedia pollution prevention programs”); §§ 20-21 (codified at IND. CODE §§ 13-9-4-15, 13-9-5-3) (providing guidelines for Institute publications and public dissemination of information and studies and contents of a pollution prevention manual to be published by the Institute); § 22 (codified at IND. CODE § 13-9-7-2) (stipulating that guidance documents and pollution prevention policies are “not binding on participating businesses”), and § 23 (codified at IND. CODE § 13-9-7-3) (IDEM Division of Pollution Prevention directed to “encourage pollution prevention and not discourage the use of recycling or treatment techniques”).

As the legislatively-crafted, trilateral partnership involving the Indiana Pollution Prevention Board, the Indiana Pollution Prevention and Safe Materials Institute, and IDEM is consummated, and the Institute's first director assumes responsibilities in early 1994, pollution prevention potential in Indiana should start to convert to action.⁶⁸

*D. State Implementation of the Federal Clean
Air Act Amendments*

HEA 1839⁶⁹ implements the federal 1990 Title V requirements of the Clean Air Act Amendments of 1990⁷⁰ regarding state and federally enforceable operating permits for air pollutant sources. The new state legislation authorizes the Indiana Air Pollution Control Board to adopt rules to implement both mandatory and discretionary portions of the Clean Air Act. Significantly, the new state legislation authorizes the Indiana Air Pollution Control Board to adopt rules for the air permit program and establish a fee schedule that will recover the direct and indirect costs of running the program.⁷¹

With the passage of this new legislation, Indiana will soon be issuing and administering air permits to a much larger number of emitters in an even more complex regulatory milieu. Among the changes imposed by the federal government on the states, which led to the passage of Indiana HEA 1839, were that each state administering the federal air program must develop a new operating permit system that can implement the ozone, hazardous air pollutant, acid rain, and other provisions required by the new federal legislation. Congress further mandated that each state program must be fully funded through fees paid by the permittees.

An interesting development in the coming years will be IDEM's response to the additional requirements that become applicable to permitted sources and

68. On January 24, 1994, an Agreement on the Indiana Pollution Prevention and Safe Materials Institute was entered into between Purdue University (the situs for the Indiana Pollution Prevention & Safe Materials Institute, chosen by the Indiana Pollution Prevention Board), the Indiana Department of Environmental Management, and the Indiana Pollution Prevention Board. This Agreement formalizes the legislatively-mandated trilateral partnership between these three parties in implementing pollution prevention policy in Indiana. The Agreement provides, *inter alia*, for the following: coordination of activities and policies; administrative and financial coordination; grants and contracts coordination; policy/legislation/education coordination; cooperation regarding the State Information Clearinghouse and Computer Database; and, confidentiality of data, property rights and products, and copyright prohibition.

At its January 24, 1994 meeting, the Indiana Pollution Prevention Board chose Lynn A. Corson, Ph.D., as the first director of the Indiana Pollution Prevention and Safe Materials Institute. Minutes of Indiana Pollution Prevention Board, January 24, 1994.

69. Indiana House Enrolled Act No. 1839, Pub. L. No. 148-1993 (codified at IND. CODE §§ 13-7-11, 13-7-5-7, 13-1-1-25, 13-1-1-26, 13-7-2-15, 13-7-8.5-4, 13-7-10-2, 13-7-10-2.5, 13-7-10-5).

70. Pub. L. 101-549, Title V, Nov. 15, 1990, 104 Stat. 2690 (codified as amended at 42 U.S.C. § 7661a-f).

71. HEA 1839, *supra* note 69, § 1.

air quality regions under the federal acid rain program,⁷² and the federal ozone non-attainment program.⁷³ On a surface level of analysis, it seems likely that IDEM's federally-mandated strategy for raising sufficient revenue through permit fees on major sources of air pollution will provide the state agency with ample fiscal resources to handle the increased regulatory burdens required by federal legislation. In this respect, IDEM has crafted two preliminary alternative fee schedules for major sources, one of which will provide the basis for rulemaking by the Indiana Air Pollution Control Board. "The first bases a source's annual fee on the estimated cost to IDEM of providing to that source the range of services required by Title V [of the federal Clean Air Act Amendments of 1990]. The second schedule bases fees on [a] pre-established cost per ton of pollution as suggested in the approach described in the federal Clean Air Act."⁷⁴ Upon deeper analysis, however, the attempt to internalize the regulatory costs of administering the expensive new air program by radically shifting the burden to Indiana industrial firms is likely to lead to a variety of defensive reactions. These conceivable reactions could include industrial-led litigation challenging: (a) the reasonableness of IDEM's costs for providing air pollution regulatory services, (b) the accuracy of IDEM's case-by-case assessment of pre-established cost per ton of various air pollutants, and (c) the constitutionality (on takings, due process, and equal protection grounds) of the entire federally-inspired approach.

Unless Congress is willing to complement its rigorous regulatory requirements concerning air pollution with generous revenue sharing payments or grants-in-aid programs, Indiana and other states will likely experience the fiscal cost of more demanding regulation in a manner analogous to its recent difficulties with water and hazardous waste regulation. Ultimately, this scenario could lead to efforts to return additional onerous state regulatory responsibilities to the federal government.⁷⁵

III. CASE LAW DEVELOPMENTS

During the 1993 survey period, Indiana state courts and federal courts, addressing problems that arose within Indiana, issued a number of opinions on a variety of interesting environmental and natural resources issues. Five significant published opinions—two state and three federal—are worthy of further comment.

72. *Id.* § 8.

73. *Id.* § 10.

74. *Title V Air Operating Permit Program*, 6 INDIANA WASTE EXCHANGE No. 5 (Oct./Nov. 1993) at 3.

75. *See supra* notes 1-37 and accompanying text.

A. *State Opinions*

In *Indiana Department of Environmental Management v. Conrad*,⁷⁶ the Supreme Court of Indiana issued an important state administrative law decision which limited the ability of a citizen to challenge the terms of a federal consent order. After the federal consent order, Westinghouse had submitted to IDEM a NPDES water permit application for a landfill water treatment facility. IDEM issued the NPDES permit to Westinghouse, which included the one part per billion (ppb) PCB limit contained in the consent decree. The Conrads unsuccessfully sought to have the administrative law judge set aside the one ppb PCB limitation established in the consent decree. However, after a hearing, the Indiana Water Pollution Control Board adopted the administrative law judge's recommended findings and order to the effect that the IDEM permitting process "was bound by the 1 ppb limitation established in the Consent Decree."⁷⁷

The Conrads, however, were temporarily successful when they filed in the Monroe Circuit Court for judicial review of the board's decision. The trial court held that IDEM was estopped from claiming that the consent decree's one ppb PCB limit was binding, while also holding that the permitting process was not bound by the terms and limits of the consent decree. The trial court "ordered IDEM to reopen the NPDES permitting process and reconvene a hearing . . . to explain to the public that the permit is not bound by the Consent Decree, and to solicit additional public comment about the permit."⁷⁸ The court of appeals affirmed the trial court's decision.⁷⁹

The Supreme Court of Indiana reversed the Court of Appeals and trial court, focusing in large measure on the proper scope of review of an administrative decision. The Supreme Court observed that "[t]he trial court in this case did not accord the decision of the Water Pollution Control Board the deference required" under legislation and case law.⁸⁰ Turning to the substantive grounds, the court noted that "[a]s consent judgments are contractual in nature and [are] to be construed as written contracts . . . we look only to the terms of the decree, which unambiguously establish Westinghouse's duties concerning its treatment facility. Because Westinghouse waived its right to litigate the issues implicated in the [federal court action], the conditions upon which it gave that waiver must be respected."⁸¹ Reinforcing its decision by reference to the inability of parties to "collaterally attack" a valid consent order, the Supreme Court noted as follows: "The Conrads' challenge to the binding effect of the PCB limitations set by the Consent Decree is a collateral attack on the decree because its substance inescapably implicates the decree and because validation of their claim would

76. 614 N.E.2d 916 (Ind. 1993).

77. *Id.* at 918.

78. *Id.* at 919.

79. *Id.*

80. *Id.*

81. *Id.* at 920 (citations omitted).

adversely affect implementation of the decree.”⁸² Moreover, the court reasoned that “[t]o allow a collateral attack contesting the terms of the consent decree in this case ‘would raise the specter of inconsistent or contradictory proceedings, would promote continued uncertainty thus undermining the concept of a final judgment and would violate the policy of promoting settlement of actions alleging violations of federal law.’”⁸³

While the ultimate effect of the decision was to foreclose the Conrad’s ability to challenge the PCB requirement for Westinghouse⁸⁴—arguably unjust since they were unable to intervene in the earlier federal case leading to the consent decree⁸⁵—*Conrad* establishes principles of certainty and predictability important in hazardous waste enforcement law. In concluding that a collateral attack by the Conrads was impermissible, the Indiana Supreme Court expressed a major public policy concern regarding negotiated settlements in environmental litigation with the government. Allowing collateral attacks would only defeat the purpose behind settlements, which is to instigate the cleanup of hazardous contamination. Without a predictable and certain settlement, there would be no incentive for defendants, like Westinghouse, to settle. The *Conrad* decision, therefore, will encourage defendants to negotiate settlements with the government and advance large-scale public interests in predictable settlements to clean up hazardous waste sites.

In *Indiana Department of Natural Resources v. United Refuse Company Inc.*,⁸⁶ the Supreme Court of Indiana issued another important administrative law decision in the area of environmental and natural resources law. The case involved a landfill operator who filed an application to construct an earthen dike on floodway property in order to expand its landfill operations. The Natural Resources Commission (NRC) denied the permit because it found the area to be a storage floodway. United Refuse then requested an administrative review of the denial. An administrative law judge conducted a hearing and issued a report, including proposed findings of fact and a recommended order. The ALJ found that there was a “rational basis” for the Natural Resources Commission’s denial.⁸⁷

United Refuse sought judicial review, arguing that the administrative law judge had not fulfilled his duties by deferring to the Natural Resources Commission’s determination that the area in question was a storage floodway. The trial court vacated the administrative order. Upon appeal by the Commis-

82. *Id.* at 922.

83. *Id.* (citations omitted).

84. *Id.* at 923.

85. *Id.*

86. 615 N.E.2d 100 (Ind. 1993).

87. *Id.* at 100-02.

sion, the Court of Appeals, in turn, reversed the trial court and reaffirmed the Natural Resources Commission's order in its entirety.⁸⁸

In granting transfer of the case, the Supreme Court held that: (1) the property at issue was a floodway within the Natural Resources Commission's jurisdiction, but that (2) the administrative law judge did use an erroneous standard of appellate review at the administrative hearing.⁸⁹ Reasoning that an administrative law judge "performs a duty similar to that of a trial judge sitting without a jury,"⁹⁰ the Supreme Court criticized the administrative law judge in the case at bar for "deferr[ing] to the agency's initial determination by applying a reasonableness standard instead of hearing the evidence as if for the first time."⁹¹

United Refuse is an important case because it pertains to state administrative law and procedure regarding the role of an administrative law judge under Indiana's Administrative Orders and Procedures Act.⁹² The Supreme Court makes it clear in this decision that a state administrative law judge should rule strictly on the evidence presented in the hearing record. In other words, an administrative law judge is not supposed to defer to the agency by giving it the benefit of the doubt. This approach is evenhanded and properly balances the interests of state agencies with aggrieved parties who seek to challenge permit decisions by state agencies. A possible limitation of this approach, however, is that traditional notions of deference to agency expertise may have been given insufficient attention by the court.

B. Federal Opinions

The United States Court of Appeals for the Seventh Circuit, in *Amcast Industrial Corp. v. Detrex Corp.*⁹³ explored the "outer limits" of CERCLA, to resolve the important question of whether CERCLA extends to "any chemical spill that creates an environmental hazard."⁹⁴ As noted in the Court's opinion, written by Judge Posner, "[t]his is an important question that has not until now been the subject of an appellate case. Our conclusion is that the spiller, but not the shipper of the chemical that spilled, is within the Act's long reach."⁹⁵ Specifically, the Seventh Circuit held that: (1) the chemical manufacturer in the case at bar was a "responsible person" under CERCLA for chemicals spilled from its trucks, but that (2) the chemical manufacturer was not a "responsible

88. *Id.* at 102.

89. *Id.* at 102-03.

90. *Id.* at 104.

91. *Id.*

92. IND. CODE § 4-21.5-3-1 *et. seq.*

93. 2 F.3d 746 (7th Cir. 1993).

94. *Id.* at 747 (citing 42 U.S.C. § 9601 *et. seq.*).

95. *Id.*

party” under CERCLA for chemicals spilled from trucks owned by a common carrier it had hired. In classic Posnerian style, the opinion reasoned:

Detrex was a responsible person with respect to the TCE [hazardous waste] that was spilled by trucks owned by Transport Services only if by hiring Transport Services to carry the stuff to the Elkhart plant, Detrex “arranged with a transporter for transport for disposal or treatment” of TCE. . . . Detrex hired a transporter, all right, but it did not hire it to spill TCE on Elkhart’s premises. Although the statute defines disposal to include spilling, the critical words for present purposes are “arranged for.” The words imply intentional action. The only thing that Detrex arranged for Transport Services to do was to deliver TCE to Elkhart’s storage tanks. It did not arrange for spilling the stuff on the ground.⁹⁶

The *Amcast* court continued its analysis by remarking about problems of statutory construction.

Statutes sometimes use words in nonstandard senses, and do so without benefit of a definitional section. . . . Elkhart argues that we can tell that Congress was doing that here because the provision in question speaks of “disposal” and we know that “disposal” includes accidentally spilling. But since context determines meaning, the same word can mean different things in different sentences—to monopolize a conversation doesn’t mean the same thing as to monopolize the steel industry—even in the same statute, especially when the statute does not attempt to impose a single meaning by defining the word. *In the context of the operator of a hazardous-waste dump, “disposal” includes accidental spillage; in the context of the shipper who was arranging for the transportation of a product, “disposal” excludes accidental spillage because you do not arrange for an accident except in the Aesopian sense illustrated by the staged accident.*

The words “arranged with a transporter for disposal or treatment” appear to contemplate a case in which a person or institution that wants to get rid of its hazardous wastes hires a transportation company to carry them to a disposal site. If the wastes spill en route, then since spillage is disposal and the shipper had arranged for disposal—though not in that form—the shipper is a responsible person and is therefore liable for clean-up costs.

But when the shipper is not trying to arrange for the disposal of hazardous wastes, but is arranging for the delivery of a useful product,

96. *Id.* at 751.

*he is not a responsible person within the meaning of the statute and if a mishap occurs en route his liability is governed by other legal doctrines. It would be an extraordinary thing to make shippers strictly liable under the Superfund statute for the consequences of accidents to common carriers or other reputable transportation companies that the shippers had hired in good faith to ship their products.*⁹⁷

Amcast is a significant decision because it defies a trend toward extending liability for all Superfund-related claims. It is just and equitable under the statute that shippers of hazardous materials fall outside the scope of CERCLA.

In another important federal decision issued during the comment period, the United States District Court for the Northern District of Indiana in *United States v. Bethlehem Steel Corp.*⁹⁸ held that the government had established violations by Bethlehem of the Resource Conservation and Recovery Act and Safe Drinking Water Act.⁹⁹ In determining appropriate penalties, the Court concluded that the violations of the underwater injection control permits warranted civil penalties of \$4.2 million and that violations with respect to the landfill on the premises warranted a civil penalty of \$1.8 million.¹⁰⁰

In an extraordinary opinion, representing a *tour de force* of well-reasoned federal environmental penalty principles, including awarding penalties for "economic benefit" enjoyed by a violator while violating permit standards, Judge Lozano concluded that Bethlehem had not made sufficient efforts to comply with environmental standards at its Burns Harbor steel mill. This decision represents an important enforcement milestone in Indiana, particularly for the environmentally stressed Northwestern part of the state.¹⁰¹

*United States v. SCA Services of Indiana Inc.*¹⁰² is the third significant federal case arising out of Indiana to be decided during the review period. In an action brought by the government pursuant to CERCLA, the third party plaintiff and fourteen third-party defendants moved for approval of settlements, and nonsettling third party defendants filed objections. The United States District Court for the Northern District of Indiana held, however, that private parties who settle their CERCLA claims with other private parties are free from claims for contribution by nonsettling parties, albeit liability of nonsettling parties would be reduced by the amount of the settling parties' equitable share of liability, rather than by the actual dollar amounts of the settlement.¹⁰³

97. *Id.* (citations omitted) (emphasis added).

98. 829 F. Supp. 1047 (N.D. Ind. 1993).

99. *Id.* at 1050-51 (citing 42 U.S.C. § 6901 *et. seq.* & 42 U.S.C. § 300f *et. seq.*).

100. *Id.* at 1054-60.

101. See generally PAHLS, INC., THE ENVIRONMENT OF NORTHWEST INDIANA: CONTRASTS AND DILEMMAS (1993).

102. 827 F. Supp. 526 (N.D. Ind. 1993).

103. *Id.* at 535-36.

SCA is a significant CERCLA case from a public policy perspective, because it will foster settlement agreements in Indiana by providing defendants with a measure of finality which, in turn, makes settlements more desirable. While CERCLA is silent as to whether claims for contribution are barred when private parties settle with other private parties, the SCA court found that in the furtherance of public policy such settlement should be encouraged. This decision is consistent with express statutory provisions in CERCLA protecting settling parties and, to the extent that it goes beyond express statutory language, furthers the policy of CERCLA in fostering cleanup agreements and shifting the cost of cleanups to nonsettling parties, subject to equitable adjustment of liability.

IV. CONCLUSION

Although 1993 saw a ferment in legislative activity dealing with environmental and natural resources issues, and state and federal courts were vigilant in protecting environmental interests with due regard for the procedural rights of the parties, the "big story" of 1993 was the attempt to turnback previously-delegated federal water and hazardous waste administrative responsibilities to the United States Environmental Protection Agency. These developments raise the question of whether Indiana is foundering, despite past progress.

Although Indiana has encountered political turbulence, or crisis, in seeking to carry out its environmental protection responsibilities in tandem with its responsibilities to balance the state budget, it is inappropriate at this juncture to decide the foundering issue in the affirmative. For the time being, at least it can be said that the people of Indiana expect their elected and appointed state and federal government officials to strive to achieve sustainable development so economic progress is not sacrificed to long-range degradation of the human and natural resource bases of the state. No matter what course is ultimately chosen, the next few years will be critical in the environmental history of Indiana.

INDIANA RULES OF EVIDENCE

IVAN E. BODENSTEINER*

INTRODUCTION

By Order dated August 24, 1993 the Indiana Supreme Court adopted the Indiana Rules of Evidence (IRE), effective January 1, 1994.¹ These rules are generally similar to the Federal Rules of Evidence (FRE), with some significant differences. Part II will discuss the new rules, comparing them with both the FRE and prior Indiana law. Part I discusses the most important decisions of the past year, some of which continued the Indiana Supreme Court's move toward the FRE even before the effective date of the new IRE.

I. IMPORTANT DECISIONS IN 1993

Two controversial topics are addressed in a number of cases decided during the past year: Admissibility of prior acts² and use of prior statements of a witness as substantive evidence³. In *Lannan v. State*, the Indiana Supreme Court adopted Federal Rule of Evidence 404(b),⁴ which disallows evidence of prior acts to show action in conformity therewith (propensity), but allows it for other purposes, including proof of motive, intent, plan, and identity.⁵ This rule was applied in *Hardin v. State*⁶ where the defendant was charged with dealing in cocaine and evidence of prior drug dealings was admitted to prove common scheme or plan and identity. While "common scheme or plan" is not listed in 404(b) as one of the examples of admissible purposes of prior acts, the court noted that the list is not exclusive. Further, common scheme or plan fits within the terms "plan" and "identity."⁷ However, the court held that the evidence

* Professor of Law, Valparaiso University School of Law. B.A., 1965, Loras College; J.D., 1968, University of Notre Dame.

1. 617 N.E.2d LXXXIII (Ind. 1993).

2. See FED. R. EVID. 404(b).

3. See FED. R. EVID. 801(d)(1).

4. 600 N.E.2d 1334 (Ind. 1992). In abandoning the depraved sexual instinct exception to the general rule against admissibility of prior bad acts to show propensity, the court stated that "Rule 404(b) of the Federal Rules of Evidence provides a better basis for testing the admissibility of this sort of evidence than our existing caselaw provides." *Id.* at 1335. While *Lannan* applies retroactively, at least to cases pending on direct appeal at the time it was decided, *Pirnat v. State*, 607 N.E.2d 973 (Ind. 1993) (reserving the issue of its application to cases pending on collateral review), requires that the issue was properly preserved in the trial court and that any error in admitting evidence of prior offenses is not fundamental. See, e.g., *Posey v. State*, 624 N.E.2d 515, 517-18 (Ind. Ct. App. 1993); *Craig v. State*, 613 N.E.2d 501, 505 (Ind. Ct. App. 1993); *Stout v. State*, 612 N.E.2d 1076, 1079 (Ind. Ct. App. 1993); *Ried v. State*, 610 N.E.2d 275, 281-82 (Ind. Ct. App. 1993). In her dissent in *Reid*, Judge Barteau argues that fundamental fairness requires application of the new rule announced in *Lannan* because there was no "intentional or voluntary relinquishment of a known right" by the accused. It is not reasonable to expect counsel to anticipate a change in evidentiary rules and object to the introduction of evidence under a then well-recognized rule like the depraved sexual instinct rule. *Id.* at 282. See also *Martin v. State*, 622 N.E.2d 185, 187 (Ind. 1993) (where the accused objected to evidence of past sexual misconduct both in a motion in limine and on two occasions prior to testimony of the witness, the issue was not waived even though he did not object at the time the testimony was actually introduced).

5. See, e.g., *Hatton v. State*, 626 N.E.2d 442, 443 (Ind. 1993); *Thompson v. State*, 625 N.E.2d 1322, 1324 (Ind. Ct. App. 1993).

6. 611 N.E.2d 123 (Ind. 1993).

7. *Id.* at 129.

should not have been admitted to show plan because the prior acts were not similar enough to the charged offense to constitute Hardin's "signature" and there was no evidence that the prior acts were part of a preconceived plan that included the charged offense.⁸ Further, the prior acts could not be used to show identity because the evidence did not show who committed the charged crime.⁹

Hardin demonstrates that, when seeking to introduce evidence of prior acts, the prosecution has to do more than merely recite a purpose that generally fits within Rule 404(b). The prior acts must be relevant to the identified purpose or issue and the issue should be in dispute. For example, in *James v. State*,¹⁰ involving a prosecution for possession of marijuana found in the automobile of the sister of the accused, the trial court admitted evidence of the defendant's prior drug conviction and probation status for the purpose of showing both his knowledge of drugs and his intent to possess them.¹¹ The appellate court held that the evidence was improperly admitted because the issue was whether the defendant knew there was marijuana in the car, not whether he knew what marijuana was.¹² In addition, possession of marijuana in the past does not support an inference of intent to possess it at a later time. Further, admission of evidence of the prior acts was not harmless in light of the prosecutor's continual reference to this evidence.¹³

The court in *Hardin* explicitly adopted Rule 403,¹⁴ which gives trial courts the discretion to exclude relevant evidence where its probative value is substantially outweighed by (a) the danger that it will cause unfair prejudice, confuse the issues or mislead the jury or (b) considerations related to delay, waste of time or needless cumulative evidence.¹⁵ More importantly, the court held that evidence admissible under 404(b) is subject to exclusion based on Rule 403.¹⁶ The greater the similarity, the greater the danger that the jury will use the evidence for the forbidden reason—to show action in conformity therewith. Therefore, while dissimilarity between the prior acts and the charged act makes it more difficult to satisfy Rule 404(b), if the acts are too similar Rule 403 is more likely to bar admission.¹⁷

8. *Id.* at 130. *See also* *Hazelwood v. State*, 609 N.E.2d 10, 16-17 (Ind. Ct. App. 1993) (mere fact that the defendant attempted to defraud insurance companies on more than one occasion did not show a common scheme or plan, however, it did show intent and was therefore admissible).

9. 611 N.E.2d at 130.

10. *James v. State*, 622 N.E.2d 1303 (Ind. Ct. App. 1993).

11. *Id.* at 1308. In representing the accused in criminal cases, defense counsel should take advantage of the notice provision in Rule 404(b) so that the prosecution is forced to disclose its intended use of prior acts before trial. *Id.*

12. *Id.* at 1309. *Cf. McGuire v. State*, 613 N.E.2d 861, 863-64 (Ind. Ct. App. 1993) (testimony about previous uncharged drug transactions properly admitted to show intent).

13. *Id.* at 1310. *Cf. Martin v. State*, 622 N.E.2d 185, 188 (Ind. 1993) (evidence of Martin's prior sexual misconduct with his daughter twenty years earlier improperly admitted under Rule 404(b), but admission harmless because of other evidence of deviate sexual conduct and child molesting); *Taylor v. State*, 615 N.E.2d 907, 912-13 (Ind. Ct. App. 1993) (admission of uncharged misconduct as part of *res gestae* erroneous, but harmless).

14. FED. R. EVID. 403 (exclusion of relevant evidence on grounds of unfair prejudice).

15. 611 N.E.2d at 128-29.

16. *Id.* at 129.

17. *Cf. Wickizer v. State*, 619 N.E.2d 947 (Ind. Ct. App. 1993) (where the accused was charged with child molesting and argued that his intent in touching the child's genitals was not sexual gratification, the trial court did not err in admitting, under Rule 404(b), for the purpose of refuting the argument that the touchings were not sexually oriented, evidence that the accused touched the genitals of two others when they

Application of Rule 403 in conjunction with 404(b) is demonstrated in *Brim v. State*,¹⁸ where Brim was charged with beating his lover and his identity as the assailant was the primary factual issue in the trial. The court held that evidence of prior beatings was properly admitted because the beatings were sufficiently similar to the charged beating to constitute a "signature"—the victim was the same, all were alcohol related, and the accused grabbed the victim's head or hair and bounced her head into a hard surface.¹⁹ Because Brim's identity as the assailant was "hotly disputed" during trial, the court concluded that "the probative value of the evidence of the prior beatings was not substantially outweighed by the potential for unfair prejudice."²⁰ Noting there had been no admonishment nor limiting instruction regarding the purpose for which the prior beatings could be used by the jury, the court indicated that "the use of a cautiously worded limiting instruction in cases involving evidence of uncharged misconduct is available upon request and is to be encouraged."²¹ Therefore, it appears the Rule 403 balance was struck in favor of the prosecution because evidence of the prior beatings was crucial to the "hotly disputed" 404(b) issue of identity.

The second controversial topic addressed in recent Indiana decisions is the use of a witness' prior statements as substantive evidence. Rule 801(d)(1)²² makes three types of prior statements of a witness admissible as substantive evidence if the witness testifies at the trial and is subject to cross examination concerning the statements. Under 801(d)(1)(C) a prior statement is defined as non-hearsay if it is "one of identification of a person made after perceiving the person." This rule was applied in *Brim v. State*²³ where the victim of a beating was allowed to identify the accused as the person who beat her even though she could not remember the beating. She also testified that her memory comes and goes, and that she remembered making a statement to the police regarding the beating. In the recorded statement given to the police approximately ten months after the beating and admitted at trial, the victim recalled the details of the beating and identified the accused as the person who beat her. The question on appeal was whether the victim's memory was "so severely impaired that she could not be meaningfully cross-examined concerning her prior statement."²⁴

The *Brim* court resolved this issue by relying on the Supreme Court's decision in *United States v. Owens*.²⁵ In *Owens*, the Supreme Court held that the testimony of

were children; however, the court did not discuss the application of Rule 403).

18. 624 N.E.2d 27 (Ind. Ct. App. 1993). See also *McGuire v. State*, 613 N.E.2d 861 (Ind. Ct. App. 1993).

19. *Id.* at 34-35.

20. *Id.* at 35.

21. *Id.* at 35 n.3.

22. FED. R. EVID. 801(d)(1). This rule was adopted by the Indiana Supreme Court in *Modesitt v. State*, 578 N.E.2d 649, 653-54 (Ind. 1991), which overruled *Patterson v. State*, 324 N.E.2d 482 (Ind. 1975), but only prospectively. Thus *Patterson* continues to control cases tried before *Modesitt*. See, e.g., *Saintignon v. State*, 616 N.E.2d 369, 372 (Ind. 1993); *Dausch v. State*, 616 N.E.2d 13, 16-17 (Ind. 1993); *Alva v. State*, 605 N.E.2d 169 (Ind. 1993). The decision in *Modesitt* addressed only the use of prior statements as substantive evidence, not the use of prior inconsistent statements for impeachment. *Dixon v. State*, 621 N.E.2d 1152, 1156 (Ind. Ct. App. 1993).

23. 624 N.E.2d 27 (Ind. Ct. App. 1993).

24. *Id.* at 31.

25. 484 U.S. 554 (1988).

a witness to a lack of recollection about the underlying event satisfies both the confrontation clause of the sixth amendment to the U.S. Constitution and the "subject to cross-examination concerning the statement" requirement of Rule 801(d)(1).²⁶ The requirement of cross-examination is satisfied if the declarant "is placed on the stand, under oath, and responds willingly to questions."²⁷ While "limitations on the scope of examination by the trial court or assertions of privilege by the witness may undermine the process to such a degree that meaningful cross-examination within the intent of the rule no longer exists," an assertion of memory loss does not produce that effect.²⁸ Rather, an assertion of memory loss "is often the very result sought to be produced by cross-examination, and can be effective in destroying the force of the prior statement."²⁹ With this analysis, the court in *Brim* declared that since the victim took the stand, was under oath, and responded willingly to the questions posed, she was available for cross examination.³⁰

II. THE NEW INDIANA RULES OF EVIDENCE

Following is a comparison of the IRE with both the FRE and prior Indiana law and practice. Where the rules are similar or the same, cases interpreting the FRE will provide guidance in interpreting the IRE,³¹ but such decisions are not binding even where the language of the FRE and the IRE is identical. More than thirty states have adopted some version of the Uniform Rules of Evidence (URE), which are similar to the IRE. Decisions from the courts in those states will help guide the interpretation of the IRE.

A. Article I: General Provisions

1. Rule 101: Scope.³²—Indiana's new Rule of Evidence 101 is similar to FRE

26. *Id.* at 564.

27. *Id.* at 561.

28. *Id.* at 561-62.

29. *Id.* at 562.

30. *Brim*, 624 N.E.2d at 32. If a witness "testifies to a lack of memory of the subject matter of [her] statement," IND. R. EVID. 804(a)(3), she is unavailable and "former testimony" is admissible as a hearsay exception. IND. R. EVID. 804(b)(1).

31. See *supra* notes 25-29 and accompanying text for an example of an Indiana court's reliance on the U.S. Supreme Court's interpretation of a federal rule for guidance.

32. These rules govern proceedings in the courts of this State to the extent and with the exceptions stated in this rule.

(a) General Applicability. These rules apply in all proceedings in the courts of the State of Indiana except as otherwise required by the Constitution of the United States or Indiana, by the provisions of this rule, or by other rules promulgated by the Indiana Supreme Court. If these rules do not cover a specific evidence issue, common or statutory law shall apply. The word "judge" in these rules includes referees, commissioners and magistrates.

(b) Rules of Privilege. The rules and laws with respect to privileges apply at all stages of all actions, cases, and proceedings.

(c) Rules Inapplicable. The rules, other than those with respect to privileges, do not apply in the following situations:

(1) Preliminary questions of fact. The determination of questions of fact preliminary to admissibility of evidence when the issue is to be determined by the court under Rule 104(a).

1101, giving direction to the application of the evidentiary rules. However, there is some modification in Indiana's rule to accommodate a state judicial system. Further, section (a) suggests that the IRE will control over a conflicting state statute.³³ Other than providing that the evidence rules override conflicting statutes, Indiana's new Rule 101 is generally consistent with prior Indiana law and practice.

2. *Rule 102: Purpose and Construction.*³⁴—Indiana Rule of Evidence 102 is the same as FRE 102 and is generally consistent with prior Indiana law and practice. Even though rule 102 provides that the “rules shall be construed to secure fairness . . . and promotion of growth and development of the law of evidence to the end that the truth may be ascertained and proceedings justly determined,” it should not be viewed as a license to ignore the rules of evidence.³⁵

3. *Rule 103: Rulings on Evidence.*³⁶—IRE 103 is the same as FRE 103, with only slight wording modifications. Indiana Rule 103(a)(2) requires a “proper offer of proof” to make the substance of the evidence known while the federal rule requires it to be “made known to the court by offer.” Further, IRE 103(d) uses “fundamental” rather than FRE's “plain” to describe the type of error that can be noticed by the court even though it was not raised.³⁷

(2) Miscellaneous proceedings. Proceedings relating to extradition, sentencing, probation, or parole; issuance of criminal summonses, or of warrants for arrest or search, preliminary juvenile matters, direct contempt, bail hearings, small claims, and grand jury proceedings.

IND. R. EVID. Rule 101.

33. This is confirmed in *Brim v. State*, 624 N.E.2d 27, 33 (Ind. Ct. App. 1993), holding that IND. CODE § 35-37-4-14, which makes evidence of a previous battery admissible to show motive, intent, etc., is a “nullity” in light of the Indiana Supreme Court's adoption of FED. R. EVID. 403 and 404(b), in *Hardin*, *supra*, and *Lannan*, *supra*. The court in *Brim* also suggested that the legislative attempt to revive the depraved sexual instinct rule, IND. CODE § 35-37-4-15 (effective Feb. 1, 1994), is a nullity. *Id.* n.2.

34. These rules shall be construed to secure fairness in administration, elimination of unjustifiable expense and delay, and promotion of growth and development of the law of evidence to the end that the truth may be ascertained and proceedings justly determined. IND. R. EVID. 102.

35. See David A. Schlueter, *Emerging Problems Under the Federal Rules of Evidence*, A.B.A. SEC. OF LIT. (2d ed. 1991).

36. (a) Effect of Erroneous Ruling. Error may not be predicated upon a ruling which admits or excludes evidence unless a substantial right of the party is affected, and

(1) Objection. In case the ruling is one admitting evidence, a timely objection or motion to strike appears of record, stating the specific ground of objection, if the specific ground was not apparent from the context; or

(2) Offer of proof. In case the ruling is one excluding evidence, the substance of the evidence was made known to the court by a proper offer of proof, or was apparent from the context within which questions were asked.

(b) Record of Offer and Ruling. The court may add any other or further statement which shows the character of the evidence, the form in which it was offered, the objection made, and the ruling thereon. It may direct the making of an offer in question and answer form.

(c) Hearing of Jury. In jury cases, proceedings shall be conducted, to the extent practicable, so as to prevent inadmissible evidence from being suggested to the jury by any means, such as making statements or offers of proof or asking questions in the hearing of the jury.

(d) Fundamental Error. Nothing in this rule precludes taking notice of fundamental errors affecting substantial rights although they were not brought to the attention of the court.

IND. R. EVID. 103.

37. Neither of these differences appears significant.

While the Indiana rule is generally consistent with prior Indiana law and practice, 103(a)(2) makes it clear that an offer of proof is required on cross examination where the substance of the evidence is not clear from the context of the question.

4. *Rule 104: Preliminary Questions.*³⁸—IRE is the same as FRE 104, except “presence” is added to the first sentence of section (c).³⁹ The rule is generally consistent with prior Indiana law and practice.

5. *Rule 105: Limited Admissibility.*⁴⁰—IRE 105 is the same as FRE 105 except, when informing the jury on the restricted scope of the evidence, Indiana substitutes “admonish” for “instruct”. This change avoids application of Trial Rule 51(D) which limits the number of tendered instructions.

The new IRE is generally consistent with prior Indiana law and practice, although the rule now makes the admonition mandatory when requested.⁴¹

6. *Rule 106: Remainder of or Related Writing or Recorded Statements.*⁴²—IRE 106 is the same as FRE 106 and is generally consistent with prior Indiana law and practice. Neither the Indiana rule nor the federal rule indicates whether the remainder of an admitted writing or recorded statement sought to be introduced must be otherwise admissible.

B. Article II: Judicial Notice

*Rule 201.*⁴³—Indiana’s rule on judicial notice is generally similar to the federal

38. (a) Questions of Admissibility Generally. Preliminary questions concerning the qualification of a person to be a witness, the existence of a privilege, or the admissibility of evidence shall be determined by the Court, subject to the provisions of subdivision (b). In making its determination, it is not bound by the Rules of Evidence, except those with respect to privileges.

(b) Relevancy Conditioned on Fact. When the relevancy of evidence depends upon the fulfillment of a condition of fact, the Court shall admit it upon, or subject to, the introduction of evidence sufficient to support a finding of the fulfillment of the condition.

(c) Hearing of Jury. Hearings on the admissibility of confessions shall in all cases be conducted out of the presence and hearing of the jury. Hearings on other preliminary matters shall be so conducted when the interests of justice require, or when an accused is a witness and so requests.

(d) Testimony by Accused. The accused does not, by testifying upon a preliminary matter, become subject to cross-examination as to other issues in the case.

(e) Weight and Credibility. This rule does not limit the right of a party to introduce before the jury evidence relevant to weight or credibility.

IND. R. EVID. 104.

39. If “presence” is interpreted literally, it could eliminate “side bar” conferences.

40. When evidence which is admissible as to one party or for one purpose but not admissible as to another party or for another purpose is admitted, the court, upon request, shall restrict the evidence to its proper scope and admonish the jury accordingly. IND. R. EVID. 105.

41. See, e.g., *Brim v. State*, 624 N.E.2d 27, 35 n.3 (Ind. Ct. App. 1993) (limiting instruction is available upon request in cases involving evidence of uncharged prior acts).

42. When a writing or recorded statement or part thereof is introduced by a party, an adverse party may require at that time the introduction of any other part or any other writing or recorded statement which in fairness ought to be considered contemporaneously with it. IND. R. EVID. 106.

43. (a) Kinds of Facts. A court may take judicial notice of a fact. A judicially-noticed fact must be one not subject to reasonable dispute in that it is either (1) generally known within the territorial jurisdiction of the trial court, or (2) capable of accurate and ready determination by resort to sources whose accuracy cannot reasonably be questioned.

rule. IRE 201(a) is the same as FRE 201(b), except that Indiana adds, “[a] court may take judicial notice of a fact.” Further, IRE sections (c) - (g) are the same as the FRE. Indiana removes the federal limitation to adjudicative facts,⁴⁴ and IRE 201(b), providing for judicial notice of certain law, is not in the FRE.

Because prior Indiana law is less than clear, it is difficult to state the changes. However, a few comments are appropriate. First, the mandatory language in section (d) appears to represent a change from prior discretion. Second, in civil cases section (g) makes judicially noticed facts binding on the jury, in contrast to a rebuttable presumption. Third, codified municipal ordinances can now be judicially noticed.

C. Article III: Presumptions in Civil Actions and Proceedings

*Rule 301.*⁴⁵—IRE 301 is generally the same as FRE 301, with the addition that “[a] presumption shall have continuing effect even though contrary evidence is received.”

The first sentence of the IRE is generally consistent with prior Indiana law, providing that a presumption affects only the burden of production, not the burden of persuasion, and disappears once contrary evidence is introduced. However, the addition of the second sentence represents a change because now the presumption will have a continuing effect even after contrary evidence is introduced. In a jury trial the party relying upon the presumption will be entitled to an instruction advising the jury that the law creates a presumption and that it should consider the presumption along with the other evidence.

D. Article IV: Relevancy

(b) *Kinds of Laws.* A court may take judicial notice of law. Law includes (1) the decisional, constitutional, and public statutory law, (2) rules of court, (3) published regulations of governmental agencies, (4) codified ordinances of municipalities, and (5) laws of other governmental subdivisions of the United States or of any state, territory or other jurisdiction of the United States.

(c) *When Discretionary.* A court may take judicial notice, whether requested or not.

(d) *When Mandatory.* A court shall take judicial notice if requested by a party and supplied with the necessary information.

(e) *Opportunity to be Heard.* A party is entitled, upon timely request, to an opportunity to be heard as to the propriety of taking judicial notice and the tenor of the matter noticed. In the absence of prior notification, the request may be made after judicial notice has been taken.

(f) *Time of Taking Notice.* Judicial notice may be taken at any stage of the proceeding.

(g) *Instructing the Jury.* In a civil action or proceeding, the court shall instruct the jury to accept as conclusive any fact judicially noticed. In a criminal case, the court shall instruct the jury that it may, but is not required to, accept as conclusive any fact judicially noticed.

FED. R. EVID. 201.

44. The federal rules provide that judicial notice governs only adjudicative facts. FED. R. EVID. 201(a).

45. In all civil actions and proceedings not otherwise provided for by constitution, statute, judicial decision or by these rules, a presumption imposes on the party against whom it is directed the burden of going forward with evidence to rebut or meet the presumption, but does not shift to such party the burden of proof in the sense of the risk of nonpersuasion, which remains throughout the trial upon the party on whom it was originally cast. A presumption shall have continuing effect even though contrary evidence is received. IND. R. EVID. 301.

1. *Rule 401: Definition of "Relevant Evidence."*⁴⁶—IRE 401 is the same as FRE 401. Although there is a change in the language, the rule is generally consistent with prior Indiana law and practice. Under the new rule, relevancy has two aspects: (1) probative value, and (2) fact of consequence (formerly "material" fact). Therefore, it is no longer necessary to state, "objection, irrelevant and immaterial." "Irrelevant" alone, along with an appropriate explanation, will suffice.

2. *Rule 402: Relevant Evidence Generally Admissible; Irrelevant Evidence Inadmissible.*⁴⁷—IRE 402 is essentially the same as FRE 402, with a slight modification in the "except as otherwise provided" clause.⁴⁸ This rule, with its reference to "by statute not in conflict with these rules," supports IRE 101(a) insofar as it provides that the evidentiary rule will control when there is a conflicting state statute. The rule is consistent with prior Indiana law and practice.

3. *Rule 403: Exclusion of Relevant Evidence on Grounds of Prejudice, Confusion or Undue Delay.*⁴⁹—Although IRE 403 is generally the same as FRE 403, only the federal rule provides for exclusion of relevant evidence based on a "waste of time." The new rule is generally consistent with prior Indiana law and practice, but it may modify Indiana cases excluding evidence because of "unfair surprise." However, in light of discovery and pretrial proceedings, particularly in civil cases, a continuance is usually a more appropriate remedy if there is unfair surprise. Finally, in applying IRE 403, a recent Indiana case, *Barnes v. Barnes*,⁵⁰ suggests that only marginally relevant evidence should be excluded by this balancing test.

4. *Rule 404: Character Evidence not Admissible to Prove Conduct; Exceptions; Other Crimes.*⁵¹—Indiana's 404(a) is the same as FRE 404(a). A prior case,

46. "Relevant evidence" means evidence having any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence. IND. R. EVID. 401.

47. All relevant evidence is admissible, except as otherwise provided by the United States or Indiana constitutions, by statute not in conflict with these rules, by these rules or by other rules applicable in the courts of this State. Evidence which is not relevant is not admissible. IND. R. EVID. 402.

48. The federal rule provides that relevant evidence is admissible, "except as otherwise provided by the Constitution of the United States, by Act of Congress, by these rules, or by other rules prescribed by the Supreme Court pursuant to statutory authority." FED. R. EVID. 402.

49. Although relevant, evidence may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury, or by considerations of undue delay, or needless presentation of cumulative evidence. IND. R. EVID. 403.

50. 603 N.E.2d 1337, 1343 (Ind. 1992).

51. (a) Character Evidence Generally. Evidence of a person's character or a trait of character is not admissible for the purpose of proving action in conformity therewith on a particular occasion, except:

(1) Character of accused. Evidence of a pertinent trait of character offered by an accused, or by the prosecution to rebut the same;

(2) Character of victim. Evidence of a pertinent trait of character of the victim of the crime offered by an accused, or by the prosecution to rebut the same, or evidence of a character trait of peacefulness of the victim offered by the prosecution in a homicide case to rebut evidence that the victim was the first aggressor;

(3) Character of witness. Evidence of the character of a witness, as provided in Rules 607, 608 and 609.

(b) Other Crimes, Wrongs, or Acts. Evidence of other crimes, wrongs, or acts is not admissible to prove the character of a person in order to show action in conformity therewith. It may, however, be admissible for other purposes, such as proof of motive, intent, preparation, plan, knowledge, identity, or absence of mistake or accident, provided that upon request by the

Niemeyer v. McCarthy,⁵² applied the “character of victim” exception to civil cases while the new IRE 402(a)(2) is limited to criminal cases. Despite this distinction, section (a) of the rule is generally consistent with prior Indiana law.

Indiana’s 404(b) does not include “opportunity” as one of the other admissible purposes of character. Since *Lannan v. State*,⁵³ prior Indiana law is the same as section (b) of IRE 404. Several observations related to Rule 404(b) are in order. First, except for the notice provision, section (b) applies to civil as well as criminal cases. Second, Rule 403 can be used to exclude evidence otherwise admissible under 404(b).⁵⁴ Third, the court determines whether the prior act is probative of a fact of consequence other than character, per 104(a), and whether there is “evidence sufficient to support a finding” that the act was committed, per 104(b). However, the jury, per 104(b), ultimately determines whether the prior act occurred and whether the party against whom it is offered committed it; that is, whether it is relevant.⁵⁵ Finally, defense attorneys in criminal cases should routinely submit a request to determine whether the prosecution intends to offer 404(b) evidence.

5. *Rule 405: Methods of Proving Character*.⁵⁶—The first part of section IRE 405(a) and all of section (b) are the same as FRE 405. The notice provision, the third sentence of section (a), is not in the FRE.

Allowing use of opinion testimony, possibly including that of an expert (psychologist or psychiatrist), represents at least a clarification and probably a change in Indiana law.⁵⁷ The notice provision is also new to Indiana and may be very helpful to the accused in determining whether to use character evidence.

6. *Rule 406: Habit; Routine Practice*.⁵⁸—IRE 406 is the same as FRE 406. The rule is generally consistent with prior Indiana law and practice, although prior law

accused, the prosecution in a criminal case shall provide reasonable notice in advance of trial, or during trial if the court excuses pre-trial notice on good cause shown, of the general nature of any such evidence it intends to introduce at trial.

IND. R. EVID. 404.

52. 51 N.E.2d 365, 367 (Ind. 1943).

53. 600 N.E.2d 1334 (Ind. 1992) (abandoning the depraved sexual instinct exception in adopting Federal Rule of Evidence 404(b)).

54. See *Hardin v. State*, 611 N.E.2d 123, 128 (Ind. 1993).

55. See *Huddleston v. United States*, 485 U.S. 681 (1988).

56. (a) Reputation or Opinion. In all cases in which evidence of character or a trait of character of a person is admissible, proof may be made by testimony as to reputation or by testimony in the form of an opinion. On cross-examination, inquiry is allowable into relevant specific instances of conduct. Upon reasonable pre-trial notice by the accused of the intention to offer character evidence, the prosecution in a criminal case shall provide the accused with any relevant specific instances of conduct to be used in cross-examination.

(b) Specific Instances of Conduct. In cases in which character or a trait of character of a person is an essential element of a charge, claim, or defense, proof may also be made of specific instances of that person’s conduct.

IND. R. EVID. 405.

57. Allowing opinion testimony greatly expands the character evidence available in a trial.

58. Evidence of the habit of a person or of the routine practice of an organization, whether corroborated or not and regardless of the presence of eyewitnesses, is relevant to prove that the conduct of the person or organization on a particular occasion was in conformity with the habit or routine practice. IND. R. EVID. 406.

more clearly allowed evidence of an organization's routine practice rather than an individual's habit.⁵⁹

7. *Rule 407: Subsequent Remedial Measures.*⁶⁰—IRE 407 is the same as FRE 407 and is generally consistent with prior Indiana law and practice. Neither the FRE nor the IRE addresses application of the rule to strict liability cases. Prior Indiana cases suggest that the rule would apply to strict liability,⁶¹ while the federal circuits are split.⁶²

8. *Rule 408: Compromise and Offers to Compromise.*⁶³—IRE 408 is similar to FRE 408, with a couple of changes. The third sentence of the FRE, "[t]his rule does not require the exclusion of any evidence otherwise discoverable merely because it is presented in the course of compromise negotiations," is omitted from IRE⁶⁴ while the last sentence of the Indiana rule, concerning dispute resolutions, is not found in the FRE.

Contrary to Indiana common law, the new IRE 408 does not allow evidence of conduct or statements made in compromise negotiations to be admitted. Otherwise the rule is generally consistent with prior Indiana law and practice.

9. *Rule 409: Payment of Medical and Similar Expenses.*⁶⁵—IRE 409 modifies the federal version of the rule in two ways: First, Indiana excludes evidence of "paying" as well as "furnishing, or offering or promising to pay" expenses.⁶⁶ Second, Indiana expressly covers expenses occasioned by damages to property, as well as injury. This rule is consistent with prior Indiana law and practice.

10. *Rule 410: Withdrawn Pleas and Offers.*⁶⁷—The second paragraph of IRE

59. A habit is one's "regular response to a repeated specific situation," whereas character is a more general description of one's disposition.

60. When after an event, measures are taken which, if taken previously, would have made the event less likely to occur, evidence of the subsequent measures is not admissible to prove negligence or culpable conduct in connection with the event. This rule does not require the exclusion of evidence of subsequent measures when offered for another purpose, such as proving ownership, control, or feasibility of precautionary measures, if controverted, or impeachment. IND. R. EVID. 407.

61. See *Ragsdale v. K-Mart Corp.*, 468 N.E.2d 524 (Ind. Ct. App. 1984); *Ortho Pharmaceutical Corp. v. Chapman*, 388 N.E.2d 541 (Ind. Ct. App. 1979).

62. Compare *Burke v. Deere & Co.*, 6 F.3d 497, 506 (8th Cir. 1993) (FRE 407 does not apply) with *Oberst v. International Harvester Co.*, 640 F.2d 863, 866 (7th Cir. 1980) (FRE 407 does apply).

63. Evidence of (1) furnishing or offering or promising to furnish, or (2) accepting or offering or promising to accept a valuable consideration in compromising or attempting to compromise a claim, which was disputed as to either validity or amount, is not admissible to prove liability for or invalidity of the claim or its amount. Evidence of conduct or statements made in compromise negotiations is likewise not admissible. This rule does not require exclusion when the evidence is offered for another purpose, such as proving bias or prejudice of a witness, negating a contention of undue delay, or proving an effort to obstruct a criminal investigation or prosecution. Compromise negotiations encompass alternative dispute resolution. IND. R. EVID. 408.

64. It is not anticipated that omission of this sentence will lead to a different result under the IRE.

65. Evidence of paying or furnishing, or offering or promising to pay medical, hospital, or similar expenses occasioned by an injury, or damage to property is not admissible to prove liability for such injury or damages. IND. R. EVID. 409.

66. The federal rule refers to "[e]vidence of furnishing or offering or promising to pay." FED. R. EVID. 409.

67. Evidence of a plea of guilty or admission of the charge which was later withdrawn, or a plea of *nolo contendere*, or of an offer so to plead to the crime charged or any other crime, or of statements made in connection with any of the foregoing withdrawn pleas or offers, is not admissible in any civil or criminal action, case or proceeding against the person who made the plea or offer.

410 is the same as FRE 410. The first paragraph of IRE 410, although quite similar, is worded differently than FRE 410. The federal rule excludes evidence of “any statement made in the course of plea discussions with an attorney for the prosecuting authority . . .,” thus leaving admissible similar statements made to the police. While this provision is not included in the Indiana rule, Indiana cases indicate that the courts have adopted this position.⁶⁸ The rest of the rule is generally consistent with prior Indiana law and practice.⁶⁹

11. *Rule 411: Liability Insurance.*⁷⁰—IRE 411 is the same as FRE 411 and is consistent with prior Indiana law and practice.

12. *Rule 412: Evidence of Past Sexual Conduct.*⁷¹—IRE 412 is different than FRE 412. The Indiana rule is essentially a streamlined version of the Indiana rape shield statute.⁷² Consistent with *Barnes v. Barnes*,⁷³ the rule does not apply in civil cases.

However, such a statement is admissible (i) in any proceeding wherein another statement made in the cause of the same plea or plea discussion has been introduced and the statement ought in fairness to be considered contemporaneously with it, or (ii) in a criminal proceeding for perjury or false statement if the statement was made by the defendant under oath, on the record and in the presence of counsel. IND. R. EVID. 410.

68. See, e.g., *Martin v. State*, 537 N.E.2d 491, 493 (Ind. 1989).

69. See IND. CODE §§ 35-35-1-4 (1993), 35-35-3-4 (1993). In holding that a confession given by the defendant during plea discussions with the prosecutor was inadmissible under IND. CODE § 35-35-3-4, the court in *Bell v. State*, 622 N.E.2d 450, 453 n.3 (Ind. 1993), noted that this rule of inadmissibility was consistent with IND. R. EVID. 410. Cf. *Mundt v. State*, 612 N.E.2d 566 (Ind. Ct. App. 1993) (defendant, as part of plea agreement, gave statement identifying Baird as an accomplice and, after the agreement was withdrawn, Baird testified against defendant; statement given *after* plea agreement is reached is not barred by the Indiana statutes governing plea negotiations).

70. Evidence that a person was or was not insured against liability is not admissible upon the issue whether the person acted negligently or otherwise wrongfully. This rule does not require the exclusion of evidence of insurance against liability when offered for another purpose, such as proof of agency, ownership, or control, or bias or prejudice of a witness. IND. R. EVID. 411.

71. (a) In a prosecution for a sex crime, evidence of the past sexual conduct of a victim or witness may not be admitted, except:

- (1) evidence of the victim's or of a witness's past sexual conduct with the defendant;
- (2) evidence which shows that some person other than the defendant committed the act upon which the prosecution is founded;
- (3) evidence that the victim's pregnancy at the time of trial was not caused by the defendant; or
- (4) evidence of conviction for a crime to impeach under Rule 609.

(b) If a party proposes to offer evidence under this rule, the following procedure must be followed:

- (1) A written motion must be filed at least ten days before trial describing the evidence. For good cause, a party may file such motion less than ten days before trial.

- (2) The court shall conduct a hearing and issue an order stating what evidence may be introduced and the nature of the questions to be permitted.

(c) If the state acknowledges that the victim's pregnancy is not due to the conduct of the defendant, the court may instruct the jury accordingly, in which case other evidence concerning the pregnancy may not be admitted.

IND. R. EVID. 412.

72. IND. CODE § 35-37-4-4 (1993). See *Stephens v. Miller*, 13 F.3d 998 (7th Cir. 1994) (en banc) (application of the statute did not unconstitutionally deprive the accused of his right to testify).

73. 603 N.E.2d 1337, 1342 (Ind. 1992).

13. *Rule 413: Medical Expenses.*⁷⁴—There is no comparable provision in the FRE to IRE 413 and the new rule represents a change in Indiana law.⁷⁵ Following are several observations relating to this rule: First, the rule addresses only reasonableness, not necessity, and therefore may not ease the plaintiff's burden. Second, the "shall constitute prima facie evidence" language in the rule suggests that it is creating a rebuttable presumption, thus triggering application of Rule 301. Third, because the rule refers to "charges . . . occasioned by an injury," it will not apply to all medical bills. Finally, since the rule asserts that "[s]tatements . . . are admissible into evidence," it may eliminate hearsay and Rule 403 concerns.

E. Article V. Privileges

*Rule 501.*⁷⁶—IRE 501 is substantially different than FRE 501, which simply directs the federal courts to either federal common law or State law to determine the privilege. This rule is generally consistent with prior Indiana law and practice, although, there is very little Indiana law related to sections (c) and (d): Privileged matter disclosed under compulsion or without opportunity to claim a privilege, and comment upon or inference from claim of privilege. The existence of a privilege will

74. Statements of charges for medical, hospital or other health care expenses for diagnosis or treatment occasioned by an injury are admissible into evidence. Such statements shall constitute prima facie evidence that the charges are reasonable. IND. R. EVID. 413.

75. See, e.g., *Smith v. Syd's, Inc.*, 598 N.E.2d 1065, 1066 (Ind. 1992) (party seeking to recover medical expenses must prove that the expenses were both reasonable and necessary; reasonableness can be proved, at least in part, by showing the amount paid by the plaintiff because it is assumed one would not pay an unreasonable bill; necessity is generally proved by offering testimony of medical experts).

76. (a) General Rule. Except as provided by constitution or statute as enacted or interpreted by the courts of this State or by these or other rules promulgated by the Indiana Supreme Court or by principles of common law in light of reason and experience, no person has a privilege to:

- (1) refuse to be a witness;
- (2) refuse to disclose any matter;
- (3) refuse to produce any object or writing; or
- (4) prevent another from being a witness or disclosing any matter or producing any object or writing.

(b) Waiver of Privilege by Voluntary Disclosure. A person with a privilege against disclosure waives the privilege if the person or person's predecessor while holder of the privilege voluntarily discloses or consents to disclosure of any significant part of the privileged matter. This rule does not apply if the disclosure itself is privileged.

(c) Privileged Matter Disclosed Under Compulsion or Without Opportunity to Claim Privilege. A claim of privilege is not defeated by a disclosure which was (1) compelled erroneously or (2) made without opportunity to claim the privilege.

(d) Comment Upon or Inference From Claim of Privilege; Instruction. Except with respect to a claim of the privilege against self-incrimination in a civil case:

- (1) Comment or inference not permitted. The claim of a privilege, whether in the present proceeding, or upon a prior occasion, is not a proper subject of comment by judge or counsel. No inference may be drawn therefrom.
- (2) Claiming privilege without knowledge of jury. In jury cases, proceedings shall be conducted, to the extent practicable, so as to facilitate the making of claims of privilege without the knowledge of the jury.
- (3) Jury instruction. Upon request, any party against whom the jury might draw an adverse inference from a claim of privilege is entitled to an instruction that no inference may be drawn therefrom.

continue to be determined by reference to the Indiana and U.S. Constitutions, statutes⁷⁷ and other rules promulgated by the Indiana Supreme Court.⁷⁸

F. Article VI. Witnesses

1. *Rule 601: General Rule of Competency.*⁷⁹—IRE 601, similar to the first sentence of FRE 601, expressly makes every person competent unless otherwise provided by the rules “or by act of the Indiana General Assembly.” The federal rule does not provide for the statutory exceptions. Further, the second sentence of FRE 601, adopting the appropriate state rule when state law provides the rule of decision, obviously is not needed. This rule is consistent with prior Indiana law and practice.

2. *Rule 602: Lack of Personal Knowledge.*⁸⁰—Indiana’s exclusion from personal knowledge of memory following hypnosis is the difference between IRE 602 and FRE 602. Under prior Indiana law a witness was presumed to have personal knowledge and the burden was on the opponent to raise the issue. Under the new rule, the proponent must establish personal knowledge. Two observations relating to the hypnosis provision should be noted: First, in *Rock v. Arkansas*⁸¹ the Court held that the constitution precludes categorical exclusion of the hypnotically refreshed testimony of an accused who cannot present a meaningful defense without such testimony; and second, the rule’s effect is unclear when a witness, who, for example, was a victim of sexual abuse as a child, recalls the abuse “after hypnosis,” but not as a result of the hypnosis.

3. *Rule 603: Oath or Affirmation.*⁸²—Although IRE 603 is worded differently than FRE 603, the substance is similar. IRE 603 is consistent with prior Indiana law and practice.⁸³

4. *Rule 604: Interpreters.*⁸⁴—IRE 604 is the same as FRE 604 and is consistent with prior Indiana law and practice.⁸⁵

77. Thus cases like *Shaw v. Shelby County DPW*, 612 N.E.2d 557 (Ind. 1993), holding that an Indiana statute providing a physician-patient privilege is inapplicable in proceedings to terminate parental rights, will not be affected by the new rule. See also *Hazelwood v. State*, 609 N.E.2d 10, 14-16 (Ind. Ct. App. 1993) (statutory marital privilege does not apply to communications one month before the marriage).

78. Under prior Indiana law the courts generally left it to the legislature to create a privilege. See *Scroggins v. Uniden Corp. of Am.*, 506 N.E.2d 83, 86 (Ind. Ct. App. 1987).

79. Every person is competent to be a witness except as otherwise provided in these rules or by act of the Indiana General Assembly. IND. R. EVID. 601.

80. A witness may not testify to a matter unless evidence is introduced sufficient to support a finding that the witness has personal knowledge of the matter. A witness does not have personal knowledge as to a matter recalled or remembered, if the recall or remembrance occurs only during or after hypnosis. Evidence to prove personal knowledge may, but need not, consist of the testimony of the witness. This rule is subject to the provisions of Rule 703, relating to opinion testimony by expert witnesses. IND. R. EVID. 602.

81. 483 U.S. 44, 61 (1987).

82. Before testifying, every witness shall swear or affirm to testify to the truth, the whole truth, and nothing but the truth. The mode of administering an oath or affirmation shall be such as is most consistent with, and binding upon the conscience of the person to whom the oath is administered. IND. R. EVID. 603.

83. See IND. CODE § 34-1-14-2 (1993); IND. CONST. art. I, § 8; IND. R. TRIAL P. 43(D).

84. An interpreter is subject to the provisions of these rules relating to qualification as an expert and the administration of an oath or affirmation to make a true translation. IND. R. EVID. 604.

85. See IND. CODE § 34-1-14-3 (1993); IND. R. TRIAL P. 43(F); *Martinez Chevez v. State*, 534 N.E.2d 731, 736 (Ind. 1989).

5. *Rule 605: Competency of Judge as Witness.*⁸⁶—IRE 605 is the same as FRE 605. This represents a change from prior Indiana law under which a presiding judge appears to be competent to testify pursuant to statute.⁸⁷

6. *Rule 606: Competency of Juror as Witness.*⁸⁸—IRE 606(a) is the same as FRE 606(a), excluding members of the jury from testifying. IRE 606(b) is similar to the federal rules, except it adds “drug or alcohol use by any juror” as one of the matters to which a juror may testify. This rule is generally consistent with prior Indiana law and practice.

7. *Rule 607: Who may Impeach.*⁸⁹—IRE 607 is the same as FRE 607. This rule changes prior Indiana law which precluded impeachment of one’s own non-hostile witness. However, it may be improper to call a witness for the sole purpose of impeaching the witness with, for example, a prior inconsistent statement that is otherwise inadmissible, particularly in a criminal case.⁹⁰

8. *Rule 608: Evidence of Character and Conduct of Witness.*⁹¹—IRE 608(a) follows FRE 608(a) except that “untruthfulness” is omitted from part (1) when referring to admissible evidence of character. It appears that this omission may have been inadvertent in light of the fact that “untruthfulness” is included in section (b) and the proposed commentary accompanying (a) referred to “untruthfulness”. IRE 608(a)

86. The judge presiding at the trial may not testify in that trial as a witness. No objection need be made to preserve the point. IND. R. EVID. 605.

87. See IND. CODE §§ 34-1-14-4 (1993), 34-1-14-5 (1993).

88. (a) At the Trial. A member of the jury may not testify as a witness before that jury in the trial of the case in which the juror is sitting. If the juror is called so to testify, the opposing party shall be afforded an opportunity to object out of the presence of the jury.

(b) Inquiry into Validity of Verdict or Indictment. Upon an inquiry into the validity of a verdict or indictment, a juror may not testify as to any matter or statement occurring during the course of the jury’s deliberations or to the effect of anything upon that or any other juror’s mind or emotions as influencing the juror to assent to or dissent from the verdict or indictment or concerning the juror’s mental processes in connection therewith, except that a juror may testify (1) to drug or alcohol use by any juror, (2) on the question of whether extraneous prejudicial information was improperly brought to the jury’s attention or (3) whether any outside influence was improperly brought to bear upon any juror. A juror’s affidavit or evidence of any statement by the juror concerning a matter about which the juror would be precluded from testifying may not be received for these purposes.

IND. R. EVID. 606.

89. The credibility of a witness may be attacked by any party, including the party calling the witness. IND. R. EVID. 607.

90. See, e.g., *United States v. Webster*, 734 F.2d 1191, 1192 (7th Cir. 1984).

91. (a) Opinion and Reputation Evidence of Character. The credibility of a witness may be attacked or supported by evidence in the form of opinion or reputation, but subject to these limitations: (1) the evidence may refer only to character for truthfulness, and (2) evidence of truthful character is admissible only after the character of the witness for truthfulness has been attacked by opinion or reputation evidence or otherwise.

(b) Specific Instances of the Conduct of a Witness. For the purpose of attacking or supporting the witness’s credibility, other than conviction of a crime as provided in Rule 609, specific instances may not be inquired into or proven by extrinsic evidence. They may, however, in the discretion of the court, if probative of truthfulness or untruthfulness, be inquired into on cross-examination of the witness concerning the character for truthfulness or untruthfulness of another witness as to which character the witness being cross-examined has testified.

IND. R. EVID. 608.

differs from prior Indiana law because it allows the use of opinion testimony to establish character.⁹²

IRE 608(b) differs substantially from FRE 608(b) in that Indiana does not permit impeachment of a witness by inferences drawn from specific instances of conduct. This section is generally consistent with prior Indiana law and practice. 9. *Rule 609: Impeachment by Evidence of Conviction of Crime.*⁹³—IRE 609(a) differs substantially from FRE 609(a) by limiting impeachment use to the specific crimes listed and making admissibility mandatory as to all of them. IRE 609(b) is essentially the same as FRE 609(b), and Indiana's subsections (c) - (e) are the same as FRE 609(c) - (e).

IRE 609(a) is consistent with prior Indiana law. IRE 609(b) modifies prior Indiana law under which the passage of time did not create a presumption of inadmissibility and, therefore, notice was not required. In *Nunn v. State*⁹⁴ the Indiana Supreme Court adopted FRE 609(c). Juvenile adjudications were not admissible under prior Indiana law, so section (d) represents a change. Section (e) is consistent with prior Indiana law and practice.

10. *Rule 610: Religious Beliefs or Opinions.*⁹⁵—IRE 610 is the same as FRE 610. This rule is inconsistent with an Indiana statute which provides that “[n]o want

92. Also, prior Indiana law allowed evidence of general moral character. See IND. CODE § 34-1-14-13 (1993).

93. (a) General Rule. For the purpose of attacking the credibility of a witness, evidence that the witness has been convicted of a crime or an attempt of a crime shall be admitted but only if the crime committed or attempted is (1) murder, treason, rape, robbery, kidnapping, burglary, arson, criminal confinement or perjury; or (2) a crime involving dishonesty or false statement.

(b) Time Limit. Evidence of a conviction under this rule is not admissible if a period of more than ten years has elapsed since the date of the conviction or, if the conviction resulted in confinement of the witness then the date of the release of the witness from the confinement unless the court determines, in the interests of justice, that the probative value of the conviction supported by specific facts and circumstances substantially outweighs its prejudicial effect. However, evidence of a conviction more than ten years old as calculated herein is not admissible unless the proponent gives to the adverse party sufficient advance written notice of intent to use such evidence to provide the adverse party with a fair opportunity to contest the use of such evidence.

(c) Effect of Pardon, Annulment, or Certificate of Rehabilitation. Evidence of a conviction is not admissible under this rule if (1) the conviction has been the subject of a pardon, annulment, certificate of rehabilitation, or other equivalent procedure based on a finding of the rehabilitation of the person convicted, and that person has not been convicted of a subsequent crime which was punishable by death or imprisonment in excess of one year, or (2) the conviction has been the subject of a pardon, annulment, or other equivalent procedure based on a finding of innocence.

(d) Juvenile Adjudications. Evidence of juvenile adjudications is generally not admissible under this rule. The court may, however, in a criminal case allow evidence of a juvenile adjudication of a witness other than the accused if conviction of the offense would be admissible to attack the credibility of an adult and the court is satisfied that admission in evidence is necessary for a fair determination of the issue of guilt or innocence.

(e) Pendency of Appeal. The pendency of an appeal therefrom does not render evidence of a conviction inadmissible. Evidence of the pendency of an appeal is admissible.

IND. R. EVID. 609.

94. 601 N.E.2d 334, 338 (Ind. 1992).

95. Evidence of the beliefs or opinions of a witness on matters of religion is not admissible for the purpose of showing that, by reason of their nature, the witness's credibility is impaired or enhanced. IND. R. EVID. 610.

of a belief in a Supreme Being, or in the Christian religion shall render a witness incompetent[,] [b]ut the want of such religious belief may be shown upon the trial.”⁹⁶

11. *Rule 611: Mode and Order.*⁹⁷—IRE 611 is the same as FRE 611 and is generally consistent with prior Indiana law and practice.

12. *Rule 612: Writing or Object Used to Refresh Memory.*⁹⁸—Although IRE 612(a) and (b) are different in language and structure from FRE 612, the effect of the rule is essentially the same, except that the Indiana rule includes an “object” in addition to a writing, and requires production of the writing or object at “the trial, hearing, or deposition in which the witness is testifying” whereas the FRE refers only to the “hearing.”⁹⁹ Section (c) of the Indiana rule is very similar to FRE 612, but it includes a sentence indicating that if production at the trial, hearing or deposition is impracticable, the court may order that the writing or object be made available for inspection.

At least with regard to a writing or object used to refresh memory before testifying, the rule changes Indiana law insofar as it may, in the discretion of the court,

96. IND. CODE § 34-1-14-13 (1993).

97. (a) *Control by Court.* The court shall exercise reasonable control over the mode and order of interrogating witnesses and presenting evidence so as to (1) make the interrogation and presentation effective for the ascertainment of the truth, (2) avoid needless consumption of time, and (3) protect witnesses from harassment or undue embarrassment.

(b) *Scope of Cross-Examination.* Cross-examination should be limited to the subject matter of the direct examination and matters affecting the credibility of the witness. The court may, in the exercise of discretion, permit inquiry into additional matters as if on direct examination.

(c) *Leading Questions.* Leading questions should not be used on the direct examination of a witness except as may be necessary to develop the witness’s testimony. Ordinarily, leading questions should be permitted on cross-examination. Whenever a party calls a hostile witness, an adverse party, or a witness identified with an adverse party, interrogation may be by leading questions.

IND. R. EVID. 611.

98. (a) *While Testifying.* If, while testifying, a witness uses a writing or object to refresh the witness’s memory, an adverse party is entitled to have the writing or object produced at the trial, hearing, or deposition in which the witness is testifying.

(b) *Before Testifying.* If, before testifying, a witness uses a writing or object to refresh the witness’s memory for the purpose of testifying and the court in its discretion determines that the interests of justice so require, an adverse party is entitled to have the writing or object produced, if practicable, at the trial, hearing, or deposition in which the witness is testifying.

(c) *Terms and Conditions of Production and Use.* A party entitled to have a writing or object produced under this rule is entitled to inspect it, to cross-examine the witness thereon, and to introduce in evidence those portions which relate to the testimony of the witness. If production of the writing or object at the trial, hearing, or deposition is impracticable, the court may order it made available for inspection. If it is claimed that the writing or object contains matters not related to the subject matter of the testimony, the court shall examine the writing or object *in camera*, excise any portions not so related, and order delivery of the remainder to the party entitled thereto. Any portion withheld over objections shall be preserved and made available to the appellate court in the event of an appeal. If a writing or object is not produced, made available for inspection, or delivered pursuant to order under this rule, the court shall make any order justice requires, but in criminal cases if the prosecution elects not to comply, the order shall be one striking the testimony or, if the court in its discretion determines that the interests of justice so require, declaring a mistrial.

IND. R. EVID. 612.

99. Requiring production of the writing or object at a deposition may be significant in that it gives the receiving party more time to assess its value or use at trial.

require production of the writing or object even if it includes attorney work product¹⁰⁰ or privileged information.

13. *Rule 613: Prior Statements of Witnesses.*¹⁰¹—IRE 613 is the same as FRE 613. The foundation requirements are changed substantially from prior Indiana law in that “the statement need not be shown nor its contents disclosed to the witness at the time” Although extrinsic evidence of the statement is not admissible unless the witness has an opportunity to explain or deny the statement, this opportunity does not have to be provided by the cross examining party and it does not have to be provided before introducing the statement.

14. *Rule 614: Calling and Interrogation of Witnesses by Court and Jury.*¹⁰²—IRE 614(b) and (c) are the same as FRE 614(b) and (c). However, section (a) of the Indiana rule is more restrictive than FRE 614(a), which does not require “extraordinary circumstances” before allowing the court to call witnesses. IRE 614(d), interrogation by jurors, is not included in the federal rule.

This rule is generally consistent with prior Indiana law and practice, with the exception that IRE 614(a) clarifies, and possibly expands, the authority of the court to call witnesses.¹⁰³ In addressing interrogation by jurors, *Stancombe v. State*¹⁰⁴ holds that while the practice of permitting jurors to propound questions should not be encouraged, it should not be forbidden if for the purpose of discovering the truth.

15. *Rule 615: Separation of Witnesses.*¹⁰⁵—IRE 615 is the same as FRE 615,

100. See IND. R. TRIAL P. 26(B)(3).

101. (a) Examining Witness Concerning Prior Statement. In examining a witness concerning a prior statement made by the witness, whether written or not, the statement need not be shown nor its contents disclosed to the witness at that time, but on request the same shall be shown or disclosed to opposing counsel.

(b) Extrinsic Evidence of Prior Inconsistent Statement of Witness. Extrinsic evidence of a prior inconsistent statement by a witness is not admissible unless the witness is afforded an opportunity to explain or deny the same and the opposite party is afforded an opportunity to interrogate the witness thereon, or the interests of justice otherwise require. This provision does not apply to statements of a party-opponent as defined in Rule 801(d)(2).

IND. R. EVID. 613.

102. (a) Calling by Court. The court may not call witnesses except in extraordinary circumstances or except as provided for court-appointed experts, and all parties are entitled to cross-examine witnesses thus called.

(b) Interrogation by Court. The court may interrogate witnesses, whether called by itself or by a party.

(c) Objections. Objections to the calling of witnesses by the court or to interrogation by it may be made at the time or at the next available opportunity when the jury is not present.

(d) Interrogation by Juror. A juror may be permitted to propound questions to a witness by submitting them in writing to the judge, who will decide whether to submit the questions to the witness for answer, subject to the objections of the parties, which may be made at the time or at the next available opportunity when the jury is not present. Once the court has ruled upon the appropriateness of the written questions, it must then rule upon the objections, if any, of the parties prior to submission of the questions to the witness.

IND. R. EVID. 614.

103. See, e.g., *Isaac v. State*, 605 N.E.2d 144, 148-49 (Ind. 1992) (calling and questioning probation officer in probation revocation proceeding approved).

104. 605 N.E.2d 251 (Ind. Ct. App. 1992).

105. At the request of a party, the court shall order witnesses excluded so that they cannot hear the testimony of or discuss testimony with other witnesses, and it may make the order on its own motion. This rule does not authorize the exclusion of (1) a party who is a natural person, or (2) an officer or employee of a party that is not a natural person designated as its representative by its attorney, or (3) a person whose

except for Indiana's addition of "or discuss testimony with."¹⁰⁶ This rule is generally consistent with prior Indiana law and practice, although the trial court had some discretion under prior law.

16. *Rule 616: Bias of Witness.*¹⁰⁷—There is no federal counterpart to IRE 616. While evidence of bias, prejudice or interest is generally admissible to attack the credibility of a witness, the Indiana rule simply states that it "is admissible." This creates a question as to whether Rule 403 considerations are applicable. In this author's opinion, the court should have the discretion to exclude such evidence if its probative value is substantially outweighed by the danger of unfair prejudice, particularly to the accused in criminal cases.

G. Article VII. Opinions and Expert Testimony

1. *Rule 701: Opinion Testimony by Lay Witnesses.*¹⁰⁸—IRE 701 is the same as FRE 701 and is consistent with prior Indiana law and practice.

2. *Rule 702: Testimony by Experts.*¹⁰⁹—Although IRE 702(a) is the same as FRE 702, Indiana adds section (b) making expert scientific testimony admissible only if the court is satisfied that the scientific principles upon which the expert testimony rests are reliable. However, to the extent that section (b) of the Indiana rule implements *Daubert v. Merrell Dow Pharmaceuticals, Inc.*,¹¹⁰ IRE 702 is consistent with federal law. In *Daubert* the Court held that the "general acceptance" standard adopted in *Frye v. United States*¹¹¹ is superseded by FRE 702 which requires the trial court to ensure that "an expert's testimony both rests on a reliable foundation and is relevant to the task at hand."¹¹² Emphasizing the importance of methodology, the Court noted that "in order to qualify as 'scientific knowledge' an inference or assertion must be derived by the scientific method."¹¹³ Pursuant to Rule 104(a),¹¹⁴ in determining whether an expert is proposing to testify to scientific knowledge that will assist the trier of fact to understand or determine a fact in issue, trial judges should consider the following factors: (1) whether the theory or technique has been tested;

presence is shown by a party to be essential to the presentation of the party's cause. IND. R. EVID. 615.

106. Even though not included in FRE 615, if requested, federal courts will generally instruct the witnesses not to discuss their testimony.

107. For the purpose of attacking the credibility of a witness, evidence of bias, prejudice, or interest of the witness for or against any party to the case is admissible. IND. R. EVID. 616.

108. If the witness is not testifying as an expert, the witness's testimony in the form of opinions or inferences is limited to those opinions or inferences which are (a) rationally based on the perception of the witness and (b) helpful to a clear understanding of the witness's testimony or the determination of a fact in issue. IND. R. EVID. 701.

109. (a) If scientific, technical, or other specialized knowledge will assist the trier of fact to understand the evidence or to determine a fact in issue, a witness qualified as an expert by knowledge, skill, experience, training, or education, may testify thereto in the form of an opinion or otherwise.

(b) Expert scientific testimony is admissible only if the court is satisfied that the scientific principles upon which the expert testimony rests are reliable.

IND. R. EVID. 702.

110. 113 S. Ct. 2786 (1993).

111. 293 F. 1013 (D.C. Cir. 1923).

112. *Daubert*, 113 S. Ct. at 2799.

113. *Id.* at 2795.

114. FED. R. EVID. 104(a) (Questions of Admissibility Generally).

(2) whether the theory or technique has been subjected to peer review and publication; (3) the known or potential rate of error and the utilization of standards to control the technique's operation; and (4) whether the technique has general acceptance in the relevant scientific community.¹¹⁵

This rule changes prior Indiana law in at least three respects: First, it rejects the *Frye* standard as the exclusive method of establishing reliability.¹¹⁶ Second, it eliminates the need for a hypothetical question. Finally, it adopts the "assist the trier of fact" standard in the place of "beyond the knowledge" of an average juror.

3. *Rule 703: Bases of Opinion Testimony by Experts.*¹¹⁷—The first sentence in IRE 703 is the same as that in FRE 703. The second sentence is worded differently, but does not appear to be different in substance. Although the rule provides that an expert may disclose to the trier of fact the data relied upon in forming an opinion, it does not create an exception to the hearsay rule and, therefore, the data cannot be considered as substantive evidence unless otherwise admissible. IRE 703 is generally consistent with prior Indiana law and practice.

4. *Rule 704: Opinion on Ultimate Issue.*¹¹⁸—IRE 704(a) is similar to FRE 704(a).¹¹⁹ IRE 704(b) differs from FRE 704(b), in that the federal rule only excludes testimony relating to a "mental state or condition constituting an element of the crime charged or of a defense thereto." Indiana also excludes testimony relating to: (1) the truth or falsity of allegations, (2) whether a witness has testified truthfully, and (3) legal conclusions. This rule is generally consistent with prior Indiana law and practice.¹²⁰

5. *Rule 705: Disclosure of Facts or Data Underlying Expert Opinion.*¹²¹—IRE 705 is the same as FRE 705, as modified effective December 1, 1993. This rule is generally consistent with prior Indiana law and practice.

115. 113 S. Ct. at 2796-97.

116. For a recent application of the *Frye* standard, see *K-Mart Corp. v. Morrison*, 609 N.E.2d 17, 23-26 (Ind. Ct. App. 1993) (infrared thermography inadmissible under the *Frye* standard). See also *Burp v. State*, 612 N.E.2d 169, 172-73 (Ind. Ct. App. 1993) (reliability of procedures employed in a particular case goes to weight, not admissibility).

117. The facts or data in the particular case upon which an expert bases an opinion or inference may be those perceived by or made known to the expert at or before the hearing. Experts may testify to opinions based on inadmissible evidence, provided that it is of the type reasonably relied upon by experts in the field. IND. R. EVID. 703.

118. (a) Testimony in the form of an opinion or inference otherwise admissible is not objectionable merely because it embraces an ultimate issue to be decided by the trier of fact.

(b) Witnesses may not testify to opinions concerning intent, guilt, or innocence in a criminal case; the truth or falsity of allegations; whether a witness has testified truthfully; or legal conclusions.

IND. R. EVID. 704.

119. The admissibility of evidence embracing an ultimate issue in Federal Rules of Evidence 704(a) is subject to the limitation provided in subdivision (b). The Indiana rules does not have this clause. IND. R. EVID. 704(a).

120. See, e.g., *Columbia City v. Utility Regulatory Comm'n*, 618 N.E.2d 21, 28 (Ind. Ct. App. 1993) (expert opinion on the ultimate fact in issue is admissible). Cf. *Vanness v. State*, 605 N.E.2d 777, 782 (Ind. Ct. App. 1992) (attorney's opinion on the meaning of an unambiguous provision in a dissolution decree properly excluded because it was on a matter of common knowledge).

121. The expert may testify in terms of opinion or inference and give reasons therefor without first testifying to the underlying facts or data, unless the court requires otherwise. The expert may in any event be required to disclose the underlying facts or data on cross-examination. IND. R. EVID. 705.

6. *Court Appointed Experts.*—FRE 706 provides for court appointed experts, but there is no comparable Indiana rule.

H. Article VIII: Hearsay

1. *Rule 801: Definitions.*¹²²—IRE 801(a) - (c) and (d)(2) are the same as FRE 801(a) - (c) and (d)(2). Indiana's section (d)(1) imposes two limitations not found in FRE 801(d)(1): First, subsection (B) requires that prior consistent statements be made "before the motive to fabricate arose;" and second, subsection (C) requires that the statement of identification be made "shortly" after perceiving the person.

The definition of hearsay found in 801(a) - (c) is consistent with prior Indiana law and practice.¹²³ However, Rule 801(d)(1) is now inconsistent with prior Indiana law which had adopted FRE 801(d)(1).¹²⁴ Rule 801(d)(2), statement by party-opponent, represents a formal change, defining such statements as non-hearsay rather than treating them as an exception. There is also a substantive change in subsection (D) in that the statement of an agent or employee no longer has to be made while the agent is actually working, it is sufficient if made "during the existence of the relationship".

2. *Rule 802: Hearsay Rule.*¹²⁵—Under FRE 802 hearsay is not admissible "except as provided by these rules or by other rules prescribed by the Supreme Court . . . or by Act of Congress." Indiana Rule 802 provides that hearsay is not admissible "except as provided by law¹²⁶ or by these rules." Therefore, the outcome will vary

122. The following definitions apply under this Article:

(a) Statement. A "statement" is (1) an oral or written assertion or (2) nonverbal conduct of a person, if it is intended by the person as an assertion.

(b) Declarant. A "declarant" is a person who makes a statement.

(c) Hearsay. "Hearsay" is a statement, other than one made by the declarant while testifying at the trial or hearing, offered in evidence to prove the truth of the matter asserted.

(d) Statements Which are Not Hearsay. A statement is not hearsay if:

(1) Prior statement by witness. The declarant testifies at the trial or hearing and is subject to cross-examination concerning the statement, and the statement is (A) inconsistent with the declarant's testimony was given under oath subject to the penalty of perjury at a trial, hearing or other proceeding, or in a deposition; or (B) consistent with the declarant's testimony, offered to rebut an express or implied charge against the declarant of recent fabrication or improper influence or motive, and made before the motive to fabricate arose; or (C) one of identification of a person made shortly after perceiving the person; or

(2) Statement by party-opponent. The statement is offered against a party and is (A) the party's own statement, in either an individual or representative capacity; or (B) a statement of which the party has manifested an adoption or belief in its truth; or (C) a statement by a person authorized by the party to make a statement concerning the subject; or (D) a statement by the party's agent or servant concerning a matter within the scope of the agency or employment, made during the existence of the relationship; or (E) a statement by a co-conspirator of a party during the course and in furtherance of the conspiracy.

IND. R. EVID. 801.

123. See, e.g., *Craig v. State*, 613 N.E.2d 501, 503-04 (Ind. Ct. App. 1993) (out-of-court statements not considered hearsay when offered to show why an officer took certain actions).

124. *Modesitt v. State*, 578 N.E.2d 649, 653-54 (Ind. 1991).

125. Hearsay is not admissible except as provided by law or by these rules. IND. R. EVID. 802.

126. It is not clear whether this preserves all exceptions established by Indiana cases and statutes.

to the extent that federal exceptions differ from Indiana exceptions. This rule is consistent with prior Indiana law and practice.¹²⁷

3. Rule 803: Hearsay Exceptions: Availability of Declarant Immaterial.—

a. 803(1): Present sense impression¹²⁸

IRE 803(1) modifies FRE 803(1) by limiting the exception to statements describing or explaining a “material” event. Indiana’s rule also adds “transaction” as one of the things that can be described or explained, but it is not clear that this represents a substantive change. The hearsay exception under this rule was not a recognized exception under prior Indiana law and practice, although the “res gestae” exception included some of the statements covered by this rule.

b. 803(2): Excited utterance,¹²⁹ and 803(3): Then existing mental, emotional, or physical condition¹³⁰

Both IRE 803(2) and 803(3) are the same as FRE 803(2) and FRE 803(3), and both are generally consistent with prior Indiana law and practice.

c. 803(4): Statements for purposes of medical diagnosis or treatment¹³¹

IRE 803(4) is the same as FRE 803(4). This was not a recognized exception under prior Indiana law and practice.

d. 803(5): Recorded recollection¹³²

IRE 803(5) is the same as FRE 803(5). This rule modifies prior Indiana law and practice in that the foundation requirement for admitting recorded recollection is now “insufficient recollection” rather than total exhaustion of memory, thereby slightly expanding the exception. In addition, the memorandum or record is only “read into evidence,” not admitted and sent to the jury room.

e. 803(6): Records of regularly conducted business activity¹³³

127. The confrontation clauses (in the sixth amendment to the U.S. Constitution and art. I, § 13 of the Indiana Constitution) may affect the admissibility of hearsay in criminal cases.

128. (1) Present sense impression. A statement describing or explaining a material event, condition or transaction, made while the declarant was perceiving the event, condition or transaction, or immediately thereafter. IND. R. EVID. 803(1).

129. (2) Excited utterance. A statement relating to a startling event or condition made while the declarant was under the stress of excitement caused by the event or condition. IND. R. EVID. 803(2).

130. (3) Then existing mental, emotional, or physical condition. A statement of the declarant’s then existing state of mind, emotion, sensation, or physical condition (such as intent, plan, motive, design, mental feeling, pain and bodily health), but not including a statement of memory or belief to prove the fact remembered or believed unless it related to the execution, revocation, identification, or terms of declarant’s will. IND. R. EVID. 803(3).

131. (4) Statements for purposes of medical diagnosis or treatment. Statements made for purposes of medical diagnosis or treatment and describing medical history, or past or present symptoms, pain, or sensations, or the inception or general character of the cause of external source thereof insofar as reasonably pertinent to diagnosis or treatment. IND. R. EVID. 803(4).

132. (5) Recorded recollection. A memorandum or record concerning a matter about which a witness once had knowledge but now has insufficient recollection to enable the witness to testify fully and accurately, shown to have been made or adopted by the witness when the matter was fresh in the witness’s memory and to reflect that knowledge correctly. If admitted, the memorandum or record may be read into evidence but may not itself be received as an exhibit unless offered by an adverse party. IND. R. EVID. 803(5).

133. (6) Records of regularly conducted business activity. A memorandum, report, record, or data compilation, in any form, of acts, events, conditions, opinions, or diagnoses, made at or near the time by, or from information transmitted by, a person with knowledge, if kept in the course of a regularly conducted business activity, and if it was the regular practice of that business activity to make the memorandum, report, record, or data compilation, all as shown by the testimony or affidavit of the custodian or other qualified

IRE 803(6) is the same as FRE 803(6), except the Indiana rule allows the proponent of the record to establish the foundation by affidavit,¹³⁴ representing a clear change in Indiana law. In addition, the rule clearly allows admission of business records that include opinions and diagnoses.¹³⁵

*f. 803(7): Absence of entry in records kept in accordance with the provisions of paragraph (6)*¹³⁶

IRE 803(7) is the same as FRE 803(7) and is generally consistent with prior Indiana law and practice.

*g. 803(8): Public records and reports*¹³⁷

Although worded differently, the first sentence of IRE 803(8) is generally consistent with FRE 803(8). The second sentence of the Indiana rule is confusing and, with the exception of subpart (c), seems inconsistent with FRE 803(8). The following are *not* within the exception created in the first sentence: (a) "investigative reports by police . . . except when offered by an accused in a criminal case." This seems to exclude the use of such reports in civil cases when they would be admissible under FRE 803(8)(B); (b) "investigative reports prepared by or for a government, a public office, or an agency when offered by it in a case in which it is a party." There is no comparable provision in FRE 803(8), however, such reports would normally be excluded under the federal rule because the "circumstances indicate lack of trustworthiness;" and (d) "factual findings resulting from special investigation of a particular complaint, case, or incident, except when offered by an accused in a criminal case"—FRE 803(8)(D) does not exclude such factual findings in civil cases.¹³⁸ While confusing, the rule appears generally consistent with prior Indiana law and practice.

witness, unless the source of information or the method or circumstances of preparation indicate a lack of trustworthiness. The term "business" as used in this Rule includes business, institution, association, profession, occupation, and calling of every kind, whether or not conducted for profit. IND. R. EVID. 803(6).

134. See *In re Paternity of Tompkins*, 542 N.E.2d 1009, 1012 (Ind. Ct. App. 1989).

135. Cf. *Burp v. State*, 612 N.E.2d 169, 171-72 (Ind. Ct. App. 1993) (no error in admitting, as a business record, the results of a blood test showing the blood alcohol content).

136. (7) Absence of entry in records kept in accordance with the provisions of paragraph (6). Evidence that a matter is not included in the memoranda, reports, records, or data compilations, in any form, kept in accordance with the provisions of paragraph (6), to prove the nonoccurrence or nonexistence of the matter, if the matter was of a kind of which a memorandum, report, record, or data compilation was regularly made and preserved, unless the sources of information or other circumstances indicate lack of trustworthiness. IND. R. EVID. 803(7).

137. (8) Public records and reports. Unless the sources of information or other circumstances indicate lack of trustworthiness, records, reports, statements, or data compilations in any form, of a public office or agency, setting forth its regularly conducted and regularly recorded activities, or matters observed pursuant to duty imposed by law and as to which there was a duty to report, or factual findings resulting from an investigation made pursuant to authority granted by law. The following are not within this exception to the hearsay rule: (a) investigative reports by police and other law enforcement personnel, except when offered by an accused in a criminal case; (b) investigative reports prepared by or for a government, a public office, or an agency when offered by it in a case in which it is a party; (c) factual findings offered by the government in criminal cases; and (d) factual findings resulting from special investigation of a particular complaint, case, or incident, except when offered by an accused in a criminal case. IND. R. EVID. 803(8).

138. Unless a "special investigation of a particular complaint" is something different than "an investigation made pursuant to authority granted by law" (first sentence of Indiana rule), this provision appears to eliminate most of the "factual findings" exception provided in the first sentence.

*h. 803(9): Records of vital statistics*¹³⁹

IRE 803(9) is the same as FRE 803(9). Although generally consistent with prior Indiana law and practice, the new rule more clearly indicates that such records are admissible to prove their entire content.

*i. 803(10): Absence of public record or entry*¹⁴⁰

IRE 803(10) is the same as FRE 803(10) and is generally consistent with prior Indiana law and practice.

*j. 803(11): Records of religious organizations;*¹⁴¹ *803(12): Marriage, baptismal, and similar certificates;*¹⁴² *803(13): Family records;*¹⁴³ *803(14): Records of documents affecting an interest in property;*¹⁴⁴ *and 803(15): Statements in documents affecting an interest in property*¹⁴⁵

Each of these Indiana rules is the same as the corresponding federal rule and none was a recognized exception under prior Indiana law or practice. However, records of documents affecting an interest in property were generally admissible as public records and statements in documents affecting an interest in property were generally admissible pursuant to Indiana statute.¹⁴⁶

*k. 803(16): Statements in ancient documents*¹⁴⁷

FRE 803(16) requires only twenty (20) years for a document to be declared ancient while the Indiana rule requires thirty (30) years. This rule is consistent with prior Indiana law and practice.

139. (9) Records of vital statistics. Records or data compilations in any form, of births, fetal deaths, deaths, or marriages, if the report thereof was made to a public office pursuant to requirements of law. IND. R. EVID. 803(9).

140. (10) Absence of public record or entry. To prove the absence of a record, report, statement, or data compilation in any form, or the nonoccurrence or nonexistence of a matter of which a record, report, statement, or data compilation in any form was regularly made and preserved by a public office or agency, evidence in the form of a certification in accordance with Rule 902, or testimony, that a diligent search failed to disclose the record, report, statement, or data compilation, or entry. IND. R. EVID. 803(10).

141. (11) Records of religious organizations. Statements of births, marriages, divorces, deaths, legitimacy, ancestry, relationship by blood or marriage, or other similar facts of personal or family history, contained in a regularly kept record of a religious organization. IND. R. EVID. 803(11).

142. (12) Marriage, baptismal, and similar certificates. Statements of fact contained in a certificate that the maker performed a marriage or other ceremony or administered a sacrament, made by a clergyman, public official, or other person authorized by the rules or practices of a religious organization or by law to perform the act certified, and purporting to have been issued at the time of the act or within a reasonable time thereafter. IND. R. EVID. 803(12).

143. (13) Family records. Statements of fact concerning personal or family history contained in family Bibles, genealogies, charts, engravings on rings, inscriptions on family portraits, engravings on urns, crypts, or tombstones, or the like. IND. R. EVID. 803(13). *See also* IND. R. EVID. 902(9) (self-authentication of certified domestic records of regularly conducted activity).

144. (14) Records of documents affecting an interest in property. The record of a document purporting to establish or affect an interest in property, as proof of the content of the original recorded document and its execution and delivery by each person by whom it purports to have been executed, if the record is a record of a public office and an applicable statute authorized the recording of documents of that kind in that office. IND. R. EVID. 803(14).

145. (15) Statements in documents affecting an interest in property. A statement contained in a document purporting to establish or affect an interest in property if the matter stated was relevant to the purposes of the document, unless dealings with the property since the document was made have been inconsistent with the truth of the statement or the purport of the document. IND. R. EVID. 803(15).

146. *See* IND. CODE § 32-1-2-28 (1979).

147. (16) Statements in ancient documents. Statements in a document in existence thirty years or more, the authenticity of which is established. IND. R. EVID. 803(16).

*l. 803(17): Market reports, commercial publications*¹⁴⁸

IRE 803(17) is the same as FRE 803(17). This rule expands the exception under prior Indiana law.¹⁴⁹

*m. 803(18): Learned treatises*¹⁵⁰

IRE 803(18) is the same as FRE 803(18) except "that contradict the expert's testimony" does not appear in the FRE.¹⁵¹ The learned treatises exception was not recognized under prior Indiana law and practice which limited the use of such treatises to impeachment purposes.

*n. 803(19): Reputation concerning personal or family history;*¹⁵² *803(20): Reputation concerning boundaries or general history;*¹⁵³ *803(21): Reputation as to character;*¹⁵⁴ *803(22): Judgment of previous conviction*¹⁵⁵ *and 803(23): Judgment as to personal, family, or general history, or boundaries*¹⁵⁶

Each of these Indiana rules is the same as the corresponding federal rule and was not a recognized exception under prior Indiana law and practice.

o. Other Exceptions

FRE 803(24) allows the federal courts to make "other exceptions" where certain conditions are met, but there is no similar provision in the Indiana rules.

4. Rule 804: Hearsay Exceptions: Declarant Unavailable.—

*a. 804(a): Definition of unavailability*¹⁵⁷

148. (17) Market reports, commercial publications. Market quotations, tabulations, lists, directories, or other published compilations, generally used and relied upon by the public or by persons in particular occupations. IND. R. EVID. 803(17).

149. See IND. CODE § 26-1-2-724 (1993).

150. (18) Learned treatises. To the extent called to the attention of an expert witness upon cross-examination or relied upon by the expert witness in direct examination, statements contained in published treatises, periodicals, or pamphlets that contradict the expert's testimony on a subject of history, medicine, or other science or art, established as a reliable authority by the testimony or admission of the witness or by other expert testimony or by judicial notice. If admitted, the statements may be read into evidence but may not be received as exhibits. IND. R. EVID. 803(18).

151. This restriction in the Indiana rule significantly limits the exception.

152. (19) Reputation concerning personal or family history. Reputation among members of a person's family by blood, adoption, or marriage, or among a person's associates, or in the community, concerning a person's birth, adoption, marriage, divorce, death, legitimacy, relationship by blood, adoption, or marriage, ancestry, or other similar fact of a person's personal or family history. IND. R. EVID. 803(19).

153. (20) Reputation concerning boundaries or general history. Reputation in a community, arising before the controversy, as to boundaries of or customs affecting lands in the community, and reputation as to events of general history important to the community or state or nation in which located. IND. R. EVID. 803(20).

154. (21) Reputation as to character. Reputation of a person's character among associates or in the community. IND. R. EVID. 803(21).

155. (22) Judgment of previous conviction. Evidence of a final judgment entered after a trial or upon a plea of guilty (but not upon a plea of *nolo contendere*), adjudging a person guilty of a crime punishable by death or imprisonment in excess of one year, to prove any fact essential to sustain the judgment, but not including, when offered by the government in a criminal prosecution for purposes other than impeachment, judgments against persons other than the accused. The pendency of an appeal may be shown but does not affect admissibility. IND. R. EVID. 803(22).

156. (23) Judgment as to personal, family, or general history, or boundaries. Judgments as proof of matters of personal, family or general history, or boundaries, essential to the judgment, if the same would be provable by evidence of reputation. IND. R. EVID. 803(23).

157. (a) Definition of Unavailability. "Unavailability as a witness" includes situations in which the declarant

IRE 804(a) is the same as FRE 804(a), except FRE 804(a)(5) includes the following after "declarant's attendance": "(or in the case of a hearsay exception under subdivision (b)(2), (3) or (4), the declarant's attendance or testimony)." This was added to the FRE by Congress and was "designed primarily to require that an attempt be made to depose a witness (as well as to seek his attendance) as a precondition to the witness being deemed unavailable."¹⁵⁸ By omitting this clause, it appears that Indiana will not require an attempt to depose the witness as a condition of a finding of unavailability.

This rule is generally consistent with prior Indiana law and practice, although omission of the clause referred to above might suggest a change in the requirement that a deposition be taken, at least in some circumstances, before a declarant will be found unavailable under IRE 804(a)(5).

b. 804(b): Hearsay exceptions¹⁵⁹

(i) 804(b)(1): Former testimony¹⁶⁰

IRE 804(b)(1) is the same as FRE 804(b)(1). This rule is generally consistent with prior Indiana law and practice, with the exception that former testimony is not limited to a deposition or former trial of the same case or a case involving similar issues.

(ii) 804(b)(2): Statement under belief of impending death¹⁶¹

Although IRE 804(b)(2) is similar to FRE 804(b)(2), FRE limits this hearsay exception to statements made under belief of impending death to prosecutions for homicide and civil actions. The new Indiana rule expands the use of dying declarations because (1) it is no longer necessary to show that the declarant has actually died (the declarant must, however, be unavailable), and (2) the exception is no longer limited to prosecutions of homicides.

(iii) 804(b)(3): Statement against interest¹⁶²

(1) is exempted by ruling of the court on the ground of privilege from testifying concerning the subject matter of the declarant's statement; or

(2) persists in refusing to testify concerning the subject matter of the declarant's statement despite an order of the court to do so; or

(3) testifies to a lack of memory of the subject matter of the declarant's statement; or

(4) is unable to be present or to testify at the hearing because of death or then existing physical or mental illness or infirmity; or

(5) is absent from the hearing and the proponent of a statement has been unable to procure the declarant's attendance by process or other reasonable means.

A declarant is not unavailable as a witness if exemption, refusal, claim of lack of memory, inability, or absence is due to the procurement of wrongdoing of the proponent of a statement for the purpose of preventing the witness from attending or testifying. IND. R. EVID. 804(a).

158. *House Commn. on Judiciary, Fed. R. Evid., H.R. Rep. No. 650, 93d Cong., 1st Sess. 15 (1973).*

159. (b) Hearsay Exceptions. The following are not excluded by the hearsay rule if the declarant is unavailable as a witness. IND. R. EVID. 804(b).

160. (1) Former testimony. Testimony given as a witness at another hearing of the same or a different proceeding, or in a deposition taken in compliance with law in the course of the same or another proceeding, if the party against whom the testimony is now offered, or, in a civil action or proceeding, a predecessor in interest, had an opportunity and similar motive to develop the testimony by direct, cross, or redirect examination. IND. R. EVID. 804(b)(1).

161. (2) Statement under belief of impending death. A statement made by a declarant while believing that the declarant's death was imminent, concerning the cause or circumstances of what the declarant believed to be impending death. IND. R. EVID. 804(b)(2).

162. (3) Statement against interest. A statement which was at the time of its making so far contrary to the declarant's pecuniary or proprietary interest, or so far tended to subject the declarant to civil or

The first sentence of IRE 804(b)(3) is the same as the first sentence in FRE 804(b)(3), but the second sentence of the Indiana rule differs from the second sentence of the FRE. Under the federal rule, a statement that exposes the declarant to criminal liability and is offered to exculpate the accused is *not* admissible absent a clear indication of trustworthiness through corroborating circumstances. In contrast, the Indiana rule only excludes from the exception a statement, made by someone other than the accused, that implicates both the maker and the accused, and is offered against the accused. Therefore, the federal rule is less friendly toward the accused in criminal cases. Indiana's new rule is generally consistent with prior Indiana law and practice.

(iv) *804(b)(4): Statement of personal or family history*¹⁶³

IRE 804(b)(4) is the same as FRE 804(b)(4). Although this rule is generally consistent with prior Indiana law and practice, the inclusion of statements by one "intimately associated with the other's family" seems to expand the scope of the exception in Indiana.

(v) *Other Exceptions*

Although FRE 804(b)(5) allows federal courts to make "other exceptions" where certain conditions are met, there is no similar provision in the Indiana rules.

5. *Rule 805: Hearsay within Hearsay.*¹⁶⁴—IRE 805 is the same as FRE 805 and is generally consistent with prior Indiana law and practice.

6. *Rule 806: Attacking and Supporting Credibility of Declarant.*¹⁶⁵—IRE 806 is the same as FRE 806. Since there does not appear to be prior Indiana authority for attacking the credibility of the declarant of a hearsay statement, this rule modifies prior Indiana law or, at least clarifies it.

I. Article IX: Authentication and Identification

1. *Rule 901: Requirement of Authentication or Identification.*¹⁶⁶—IRE 901 is

criminal liability, or to render invalid a claim by the declarant against another, that a reasonable person in the declarant's position would not have made the statement unless believing it to be true. A statement or confession offered against the accused in a criminal case, made by a codefendant or other person implicating both the declarant and the accused, is not within this exception. IND. R. EVID. 804(b)(3).

163. (4) Statement of personal or family history. (A) A statement concerning the declarant's own birth, adoption, marriage, divorce, legitimacy, relationship by blood, adoption, or marriage, ancestry, or other similar fact of personal or family history, even though declarant had no means of acquiring personal knowledge of the matter stated; or (B) a statement concerning the foregoing matters, and death also, of another person, if the declarant was related to the other by blood, adoption, or marriage or was so intimately associated with the other's family as to be likely to have accurate information concerning the matter declared. IND. R. EVID. 804(b)(4).

164. Hearsay included within hearsay is not excluded under the hearsay rule if each part of the combined statements conforms with an exception to the hearsay rule provided in these rules. IND. R. EVID. 805.

165. When a hearsay statement, or a statement defined in Rule 801(d)(2)(C), (D), or (E), has been admitted in evidence, the credibility of the declarant may be attacked, and if attacked may be supported, by any evidence which would be admissible for those purposes if declarant had testified as a witness. Evidence of a statement or conduct by the declarant at any time, inconsistent with the declarant's hearsay statement, is not subject to any requirement that the declarant may have been afforded an opportunity to deny or explain. If the party against whom a hearsay statement has been admitted calls the declarant as a witness, the party is entitled to examine the declarant on the statement as if under cross-examination. IND. R. EVID. 806.

166. (a) General Provision. The requirement of authentication or identification as a condition precedent to admissibility is satisfied by evidence sufficient to support a finding that the matter

the same as FRE 901, except for section (b)(8). The federal rule requires that an ancient document be in existence 20 years while Indiana's rule requires 30 years. This rule is generally consistent with prior Indiana law and practice.

2. *Rule 902: Self-authentication.*¹⁶⁷—Indiana Rules 902(3) - (8) are generally

in question is what its proponent claims.

(b) Illustrations. By way of illustration only, and not by way of limitation, the following are examples of authentication or identification conforming with the requirements of this rule:

(1) Testimony of witness with knowledge. Testimony of a witness with knowledge that a matter is what it is claimed to be.

(2) Nonexpert opinion on handwriting. Nonexpert opinion as to the genuineness of handwriting, based upon familiarity not acquired for purposes of the litigation.

(3) Comparison by trier or expert witness. Comparison by the trier of fact or by expert witnesses with specimens which have been authenticated.

(4) Distinctive characteristics and the like. Appearance, contents, substance, internal patterns, or other distinctive characteristics, taken in conjunction with circumstances.

(5) Voice identification. Identification of a voice, whether heard firsthand or through mechanical or electronic transmission or recording, by opinion based upon hearing the voice at any time under circumstances connecting it with the alleged speaker.

(6) Telephone conversations. Telephone conversations, by evidence that a call was made to the number assigned at the time by the telephone company to a particular person or business, if (i) in the case of a person, circumstances, including self-identification, show the person answering to be the one called, or (ii) in the case of a business, the call was made to a place of business and the conversation related to business reasonably transacted over the telephone.

(7) Public records or reports. Evidence that a writing authorized by law to be recorded or filed and in fact recorded or filed in a public office, or a purported public record, report, statement, or data compilation, in any form, is from the public office where items of this nature are kept.

(8) Ancient documents or data compilation. Evidence that a document or data compilation, in any form, (i) is in such condition as to create no suspicion concerning its authenticity, (ii) was in a place where it, if authentic, would likely be, and (iii) has been in existence 30 years or more at the time it is offered.

(9) Process or system. Evidence describing a process or system used to produce a result and showing that the process or system produces an accurate result.

(10) Methods provided by statute or rule. Any method or authentication or identification provided by the Supreme Court of this State or by a statute or as provided by the Constitution of this State.

IND. R. EVID. 901.

167. Extrinsic evidence of authenticity as a condition precedent to admissibility is not required with respect to the following:

(1) Domestic public documents. The original or a duplicate of a domestic official record proved in a manner provided by Trial Rule 44(A)(1).

(2) Foreign public documents. The original or a duplicate of a foreign official record proved in the manner provided by Trial Rule 44(A)(2).

(3) Official publications. Books, pamphlets, or other publications issued by public authority.

(4) Newspapers and periodicals. Printed materials purporting to be newspapers or periodicals.

(5) Trade inscriptions and the like. Inscriptions, signs, tags, or labels purporting to have been affixed in the course of business and indicating ownership, control, or origin.

(6) Acknowledged documents. Original documents accompanied by a certificate of acknowledgment executed in the manner provided by law by a notary public or other officer authorized by law to take acknowledgments.

the same as FRE 902(5) - (10), except that Indiana limits "acknowledged documents" (902(6)) to "original" documents. There is no federal provision comparable to Indiana Rule 902(9) & (10) providing for self-authentication of business records (both domestic and foreign). FRE 902(1) - (4) provide for authentication of public documents and records, while Indiana Rule 902(1) & (2) simply refer to Trial Rule 44(A). The Indiana rule is generally consistent with prior Indiana law and practice, with the exception of Indiana Rule 902(9) & (10), self-authentication of domestic and foreign business records, 902(4), self-authentication of newspapers and periodicals, and 902(5), self-authentication of trade inscriptions.

3. *Rule 903: Subscribing witness' testimony unnecessary.*¹⁶⁸—IRE 903 is the same as FRE 903 and is generally consistent with prior Indiana law and practice.

J. Article X: Contents of Writings, Recordings, and Photographs

1. *Rule 1001: Definitions.*¹⁶⁹—IRE 1001 is the same as FRE 1001 except

(7) Commercial paper and related documents. Commercial paper, signatures thereon, and documents relating thereto to the extent provided by general commercial law.

(8) Presumptions created by law. Any signature, document, or other matter declared by any law of the United States or of this state, to be presumptively or prima facie genuine or authentic.

(9) Certified domestic records of regularly conducted activity. Unless the source of information or the circumstances of preparation indicate lack of trustworthiness, the original or a duplicate of a domestic record of regularly conducted activity within the scope of Rule 803(6), which the custodian thereof or another qualified person certifies under oath (i) was made at or near the time of the occurrence of the matters set forth, by or from information transmitted by, a person with knowledge of those matters; (ii) is kept in the course of the regularly conducted activity, and (iii) was made by the regularly conducted activity as a regular practice. A record so certified is not self-authenticating under this subsection unless the proponent makes an intention to offer it known to the adverse party and makes it available for inspection sufficiently in advance of its offer in evidence to provide the adverse party with a fair opportunity to challenge it.

(10) Certified foreign records of regularly conducted activity. Unless the source of information or the circumstances of preparation indicate lack of trustworthiness, the original or a duplicate of a foreign record of regularly conducted activity within the scope of Rule 803(6), which is accompanied by a written declaration by the custodian thereof or another qualified person that the record (i) was made at or near the time of the occurrence of the matters set forth, by or from information transmitted by, a person with knowledge of those matters; (ii) is kept in the course of the regularly conducted activity; and (iii) was made by the regularly conducted activity as a regular practice. The record must be signed in a foreign country in a manner which, if falsely made, would subject the maker to criminal penalty under the laws of that country, and the signature certified by a government official in the manner provided in Trial Rule 44(A)(2). The record is not self-authenticating under this subsection unless the proponent makes his or her intention to offer it known to the adverse party and makes it available for inspection sufficiently in advance of its offer in evidence to provide the adverse party with a fair opportunity to challenge it.

IND. R. EVID. 902.

168. The testimony of a subscribing witness is not necessary to authenticate a writing unless required by the laws of the jurisdiction whose laws govern the validity of the writing. IND. R. EVID. 903.

169. For purposes of this Article the following definitions are applicable:

(1) Writings and recordings. "Writings" and "recordings" consist of letters, words, sounds, or numbers, or their equivalent, set down by handwriting, typewriting, printing, photostating, photographing, magnetic impulse, mechanical or electronic recording, or other form of data compilation.

Indiana 1001(1) includes “sounds” in the definition of writings and recordings, and Indiana 1001(4) includes “facsimile transmission, or video tape” in the definition of a duplicate. This rule is generally consistent with prior Indiana law and practice.

2. *Rule 1002: Requirement of Original.*¹⁷⁰—IRE 1002 is the same as FRE 1002, but the exception clause of the IRE refers to “statute” while the FRE refers to “Act of Congress.” The rule is generally consistent with prior Indiana law and practice, except the prior “best evidence” rule in Indiana did not clearly include photographs (including X-rays) and recordings.

3. *Rule 1003: Admissibility of Duplicates.*¹⁷¹—IRE 1003 is the same as FRE 1003 and is generally consistent with prior Indiana law and practice.¹⁷²

4. *Rule 1004: Admissibility of other Evidence of Contents.*¹⁷³—IRE 1004 is the same as FRE 1004 and is generally consistent with prior Indiana law and practice.¹⁷⁴ Under this rule there is no hierarchy of “other evidence” and IRE 1004(3) clarifies that a request for production is not needed to invoke the rule.

5. *Rule 1005: Public Records;*¹⁷⁵ *Rule 1006: Summaries;*¹⁷⁶ *Rule 1007:*

(2) Photographs. “Photographs” include still photographs, x-ray films, videotapes, and motion pictures.

(3) Original. An “original” of a writing or recording is the writing or recording itself or any counterpart intended to have the same effect by a person executing or issuing it. An “original” of a photograph includes the negative or any print therefrom. If data are stored in a computer or similar device, any printout or other output readable by sight, shown to reflect the data accurately is an “original.”

(4) Duplicate. A “duplicate” is a counterpart produced by the same impression as the original, or from the same matrix, or by means of photography, including enlargements and miniatures, or by mechanical or electronic rerecording, or by chemical reproduction, or by facsimile transmission, or video tape or by other equivalent techniques which accurately reproduces the original.

IND. R. EVID. 1001.

170. To prove the content of a writing, recording, or photograph, the original writing, recording, or photograph is required, except as otherwise provided in these rules or by statute. IND. R. EVID. 1002.

171. A duplicate is admissible to the same extent as an original unless (1) a genuine question is raised as to the authenticity of the original or (2) in the circumstances it would be unfair to admit the duplicate in lieu of the original. IND. R. EVID. 1003.

172. See *Wilson v. State*, 348 N.E.2d 90, 95 (Ind. Ct. App. 1976).

173. The original is not required, and other evidence of the contents of a writing, recording, or photograph is admissible if:

(1) Originals lost or destroyed. All originals are lost or have been destroyed, unless the proponent lost or destroyed them in bad faith;

(2) Original not obtainable. No original can be obtained by any available judicial process or procedure;

(3) Original in possession of opponent. At a time when an original was under the control of the party against whom offered, such party was put on notice, by the pleadings or otherwise, that the contents would be a subject of proof at the hearing; and such party does not produce the original at the hearing; or

(4) Collateral matters. The writing, recording, or photograph is not closely related to a controlling issue.

IND. R. EVID. 1004.

174. But see Trial Rule 9.2(E) (providing for inspection of the original when a document is filed with the pleadings).

175. The contents of an official record, or of a document authorized to be recorded or filed and actually recorded or filed, including data compilations in any form, if otherwise admissible, may be proved by copy, certified as correct in accordance with Rule 902 or testified to be correct by a witness who has compared it with the original. If a copy complying with the foregoing cannot be obtained by the exercise

Testimony or Written Admissions of Party,¹⁷⁷ and Rule 1008: *Functions of Court and Jury*.¹⁷⁸—Each of these Indiana rules is the same as the corresponding federal rule and is generally consistent with prior Indiana law and practice.

K. Article XI: Rules Committee

Rule 1101.¹⁷⁹—IRE 1101 provides for an evidence rules review committee. Much of what is found in FRE 1101—applicability of rules—is also found in IRE 101—scope. Although there is no comparable provision in the FRE designating an evidence rules committee, FRE 1102 does provide for amendments. There was no comparable committee under prior Indiana law.

of reasonable diligence, other evidence of the contents may be admitted. IND. R. EVID. 1005.

176. The contents of voluminous writings, recordings, or photographs which cannot conveniently be examined in court may be presented in the form of a chart, summary, or calculation. The originals, or duplicates, shall be made available for examination or copying, or both, by other parties at a reasonable time and place. The court may order that they be produced in court. IND. R. EVID. 1006.

177. Contents of writings, recordings, or photographs may be proved by the testimony or deposition of the party against whom offered or by a written admission, without accounting for the nonproduction of the original. IND. R. EVID. 1007.

178. Whenever the admissibility of other evidence of contents of writings, recordings, or photographs under these rules depends upon the fulfillment of a condition of fact, the question whether the condition has been fulfilled is ordinarily for the court to determine in accordance with the provisions of Rule 104. However, when an issue is raised whether (1) the asserted writing ever existed, or (2) another writing, recording, or photograph produced at the trial is the original, or (3) other evidence of contents correctly reflects the contents, the issue is for the trier of fact to determine as in the case of other issues of fact. IND. R. EVID. 1008.

179. A. The Chief Justice of the Supreme Court of Indiana or a designated Justice shall serve as chairman of a permanent Evidence Rules Review Committee, which shall consist of the Chief Justice or a designated Justice, four state court trial judges, a federal court trial judge, a professor of law, and four practicing lawyers appointed to a four-year term by the Chief Justice.

B. The Evidence Rules Review Committee shall meet at the call of the Chief Justice or the designated Justice for the purpose of considering recommending amendments or additions to the Indiana Rules of Evidence. Amendments or additions may be as suggested by the Supreme Court of Indiana in current case law or the Indiana General Assembly through enactment of legislation. IND. R. EVID. 1101.

INDIANA FAMILY LAW 1993: MUCH ADO ABOUT SOME THINGS

ANDREW Z. SOSHINICK*

INTRODUCTION

Hailed as a year of great promise, 1993 brought major refinements rather than a wholesale overhaul of Indiana family law.¹ For example, the Indiana Supreme Court's long-awaited, much-anticipated amendments to the Indiana Child Support Rules and Guidelines made significant changes but did not replace the economic model upon which the Rules and Guidelines are premised. During its regular session, the Indiana General Assembly also promulgated significant but selected family law legislation, highlighted by the amendment to the grandparents' visitation statute. Indiana appellate courts continued their recent pattern of devoting increased attention to family law matters, issuing more than thirty reported decisions in the traditional areas of marital dissolution, child custody, and child support, as well as delving into ancillary areas such as paternity. On balance, the grandiose expectations for 1993 proved to be overstated and the year was far less eventful than anticipated.

I. THE INDIANA CHILD SUPPORT RULES AND GUIDELINES

On January 7, 1993, the Indiana Supreme Court issued amendments to the Indiana Child Support Rules and Guidelines ("Guidelines"), effective March 1, 1993.² Developed amidst much fanfare and controversy, the amendments to the

* Associate, Baker & Daniels, B.A., 1985, Northwestern University; M.A., 1985, Northwestern University; J.D., 1988, Northwestern University.

1. The general scope of this Article is the Survey period January 1, 1993, to and including October 31, 1993, with the exception of selected references to Indiana appellate court opinions issued after October 31, 1993.

2. The Indiana Child Support Rules and Guidelines, which contain both rules and guidelines, initially became effective on October 1, 1989. This effective date followed a lengthy intertwining of federal and state efforts. In June, 1985, the Judicial Administration Committee of the Judicial Conference of Indiana (formerly the Judicial Reform Committee of the Judicial Conference of Indiana) responded to Child Support Enforcement Amendments of 1984, Pub. L. No. 98-378 (1984), in which the United States Congress required child support guidelines to be developed on or before October 1, 1987, by beginning development of child support guidelines. These child support guidelines were not required to be mandatory, and were only required to be made available to judges and other public officials with authority to establish child support awards. 45 C.F.R. § 302.56 (1992). On September 17, 1987, the Board of Directors of the Judicial Conference of Indiana accepted the report of the Judicial Administration Committee and recommended use of the report to all judges and other public officials in Indiana with the authority to order child support. On October 13, 1988, the United States Congress passed the Family Support Act of 1988, Pub. L. No. 100-485 (1988), which made child support guidelines mandatory and applicable as a rebuttable

Guidelines followed an extensive public hearing and comment process in which citizens, special interest groups, and legislative and judicial officials voiced their often inconsistent concerns.³ The resulting amendments brought significant changes to some portions of the Guidelines, while leaving intact the basic economic framework of the 1989 version of the Guidelines. When compared to the dramatic changes proposed and contemplated during the public hearing and comment process, the amendments to the Guidelines are important, yet relatively minor.

A. Support Guideline 1 and Related Commentary

At a fundamental level, the Indiana Supreme Court rejected repeated calls to convert the economic model for the Guidelines from a gross income approach to a net income approach. Thus, the Guidelines' schedules for weekly support payments continue to be derived from the combined weekly adjusted pretax incomes of the two parents.⁴ In noting the decision to continue to calculate child support from an analysis of parents' gross incomes, however, the Commentary notes that "an average tax factor of 21.88 percent was used to adjust the support column."⁵ In pointing out this assumption, the Commentary emphasizes that "a trial court may choose to deviate from the guideline amount" based upon tax rate differentials.⁶ Given the large number of individuals whose tax rates exceed 21.88%, the Commentary creates a fertile area for deviation arguments beyond those typically explored under the 1989 version of the Guidelines.⁷ Persons and interest groups arguing the inequity of the gross income approach under the Guidelines will find little solace in the meager expansion of deviation possibilities.

presumption. The Judicial Administration Committee revised the Indiana Child Support Rules and Guidelines, which were required to be used in all proceedings involving issues of child support on or after October 1, 1989. The Federal legislation also requires all child support guidelines to be reviewed at least every four years. Family Support Act of 1988, Pub. L. No. 100-485, § 103(b) (1988). This legislative history sets the stage for the 1993 amendments to the Indiana Child Support Rules and Guidelines, which amendments resulted from recommendations from the Judicial Administration Committee and the Indiana Child Support Advisory Committee, a committee established pursuant to IND. CODE § 33-2.1-10-1 (Burns Supp. 1993).

3. It is beyond the scope of this Survey Article to recount the various positions asserted by each party or to document each change to the Guidelines. The following sections touch upon major amendments to the Guidelines. A thorough reading of the Guidelines and related Commentary is imperative to grasp fully the scope and impact of the amendments.

4. Indiana Child Support Guidelines, Commentary to Guideline 1.

5. *Id.*

6. *Id.* The Commentary provides an example of how this tax assumption corresponds to the former Marion County, Indiana, Guidelines which employed a net income model.

7. The Indiana Supreme Court also adds to the illustrative list of potential deviations by including travel expenses, payment of union dues, and support for an elderly parent.

B. Support Guideline 2 and Related Commentary

In contrast to the minimal change to Support Guideline 1, the Indiana Supreme Court amended Support Guideline 2 to provide that no more than fifty percent of a child support obligor's weekly *adjusted* income may be dedicated to child support and temporary maintenance purposes.⁸ The impact of the reduction is set out in the amendment to the "maximum spouse and children" column of the Guidelines' schedules for weekly support payments.⁹ This reduction from the previously fixed 60% level should alleviate some economic pressures for child support obligors, particularly since the Commentary requires that the obligor be allowed to retain "a means of self-support at a subsistence level."¹⁰

C. Support Guideline 3 and Related Commentary

The major amendments to the Guidelines were made to Support Guideline 3.

1. *Weekly Gross Income.*—The Indiana Supreme Court made significant clarifications in Support Guideline 3.A., as respects the determination of "weekly gross income" (Line 1 of the Child Support Worksheet).

The Guidelines now dictate that self-employment situations be more carefully scrutinized. Expenses from self-employment situations are to be "restricted to reasonable out-of-pocket expenditures necessary for the production of income [which expenditures] . . . may include a reasonable yearly deduction for necessary capital expenditures."¹¹ Significantly, "[t]he self-employed shall be permitted to deduct that portion of their F.I.C.A. tax payment that exceeds the F.I.C.A. tax that would be paid by an employee."¹² These changes should help resolve some of the most difficult child support calculations—those involving self-employed child support obligors.¹³

In an attempt to remove other issues fraught with confusion, overtime income and partnership distributions are specifically added to the Guidelines' definition of weekly gross income.¹⁴ The Commentary notes that "overtime, commissions, bonuses, periodic partnership distributions, voluntary extra work and extra hours worked by a professional" illustrate irregular or nonguaranteed income includable in weekly gross income.¹⁵ The Commentary, however,

8. Indiana Child Support Guideline 2.

9. Indiana Child Support Guidelines, Schedules for Weekly Support Payments.

10. Indiana Child Support Guideline 2, Commentary.

11. Indiana Child Support Guideline 3(A)(2).

12. *Id.* See also Indiana Child Support Guideline 3(A), Commentary, noting that, at then-present F.I.C.A. tax rates, the self-employed pay 15.30% of their gross income to a maximum, while employees pay 7.65% to the same maximum. The self-employed are therefore permitted to deduct half of their F.I.C.A. payment when calculating weekly gross income for child support purposes.

13. See, e.g., *Merrill v. Merrill*, 587 N.E.2d 188 (Ind. Ct. App. 1992).

14. Indiana Child Support Guideline 3(A)(1).

15. Indiana Child Support Guideline 3, Commentary.

cautions that child support should be set on the basis of "dependable income" and urges judges to "be innovative" in dealing with this issue.¹⁶

Additionally, the Guidelines recommend that weekly gross income should "be set at least at the *federal* minimum wage level."¹⁷ However, the Commentary advises that this potential income analysis does not mean that all costs associated with a custodial parent's employment must be introduced into the child support analysis.¹⁸ For example, the Commentary notes that the attribution of potential income to a spouse does not mandate attributing child care expenses which are not presently being incurred by the custodial parent.¹⁹ Additionally, the Commentary now presents four detailed examples regarding the attribution of potential income to an unemployed or underemployed parent.²⁰ Further, the Commentary warns that courts must carefully balance the need for a custodial parent to contribute to child support with the benefit of a parent's full-time, in-home presence.²¹ As respects imputing income, the Commentary notes that "regular and continuing payments made by a family member, subsequent spouse, roommate or live-in friend that reduce the parent's cost for rent, utilities, or groceries should be the basis for imputing income."²² These changes, while helpful, leave much room for argument on these income issues.

A major change to the Guidelines is a new provision for natural and legally adopted children living in a child support obligor's household that were born or adopted *subsequent* to the prior support order.²³ The Commentary provides specific adjustment factors which apply to each parent.²⁴ The upshot of this amendment is to place children of subsequent relationships on a more equitable footing with their older half-siblings.

2. *Income Verification*.—The Guidelines are clarified to mandate the completion and filing of child support worksheets with documentation and verification of current and past income.²⁵ This amendment effectively documents standard practices.

3. *Computation of Weekly Adjusted Income*.—A notable change to the Guidelines occurs in the subtraction of work-related child care expenses (Line 2.A. of the Child Support Worksheet) from total weekly adjusted income

16. *Id.*

17. Indiana Child Support Guideline 3(A)(3).

18. Indiana Child Support Guideline 3, Commentary.

19. *Id.*

20. *Id.*

21. *Id.*

22. *Id.*

23. Indiana Child Support Guideline 3(A)(4).

24. Indiana Child Support Guideline 3, Commentary. The factors are .935 for one child, .903 for two children, .878 for three children, .863 for four children, and .854 for five children. *See also* Lamon v. Lamon, 611 N.E.2d 154 (Ind. Ct. App. 1993), which treats a child born to a divorced couple after the marital dissolution the same as the children born of the marriage.

25. Indiana Child Support Guidelines 3(B)(1) and 3(B)(2).

(Line 1.E. of the Child Support Worksheet) to arrive at a new concept called "combined weekly adjusted income."²⁶ This amendment relieves the child support obligor from paying child support on an income partially dedicated to payment of work-related child care expenses. Additionally, the "first in time, first in right" rule contained in previous versions of the Guidelines is eliminated.²⁷

4. *Basic Child Support Obligation.*—The amended Guidelines now include schedules for combined weekly adjusted income amounts up to and including \$4,000 instead of the previous \$2,000 limit.²⁸ This inclusion should reduce the number of complicated trigonometric calculations required.²⁹

5. *Adjustments to the Basic Child Support Obligation.*—Several changes in this portion of the Guidelines are noteworthy. The Guidelines now expressly provide that work-related child care expenses (Child Support Worksheet Line 4.A.) are to be added to the basic child support obligation.³⁰ The tenor of this amendment appears to make this step mandatory, although the court of appeals has previously suggested that this addition may be discretionary.³¹ The Commentary offers the child support obligor another potential reduction. The work-related child care expense to custodial parents claiming the work-related child care credit for federal tax purposes should be reduced by the amount of tax savings to the custodial parent.³² Respecting extraordinary health care expenses (Child Support Worksheet Line 4.B.), the Guidelines now make clear that the custodial parent should pay up to six percent of the basic child support obligation annually.³³ The Commentary provides a specific example for this computation.³⁴ The Guidelines' extraordinary educational expense analysis (Child Support Worksheet Line 4.C.) revises its view of post-secondary education.³⁵ The Guidelines now explicitly direct trial courts to consider how such expenses would have been allocated had a marriage remained intact, places a more direct obligation upon the child to contribute to such expenses, and suggests that the child should be required to achieve a minimum level of academic performance as a condition for receiving parental payments toward such expenses.³⁶ The Commentary offers a detailed set of possibilities but concludes that the trial court

26. Indiana Child Support Guideline 3(C).

27. Indiana Child Support Guideline 3, Commentary.

28. Indiana Child Support Guidelines, Schedules for Weekly Support Payments.

29. See Indiana Child Support Guideline 3, Commentary.

30. Indiana Child Support Guideline 3(E)(1).

31. See *Cobb v. Cobb*, 588 N.E.2d 571, 575 (Ind. Ct. App. 1992).

32. Indiana Child Support Guideline 3, Commentary.

33. Indiana Child Support Guideline 3(E)(2).

34. Indiana Child Support Guideline 3, Commentary.

35. Indiana Child Support Guideline 3(E)(3).

36. *Id.*

retains vast discretion on this issue.³⁷ It is indisputable that this section of the Guidelines is heavily-influenced by *Carr v. Carr*.³⁸

D. Support Guideline 6 - Additional Commentary

The Indiana Supreme Court provided a lengthy Commentary to assist practitioners, courts, and litigants in applying the Guidelines. The Commentary contains part of the 1989 version of the Guidelines as well as new direction that modifies the prior Guidelines.

1. *Split Custody*.—The Commentary now expressly identifies situations where each parent has physical custody of one or more children of the marriage as “split custody,” eliminating the former confusion in nomenclature.³⁹ The Commentary continues to offer suggestions for calculating support in split custody cases.⁴⁰

2. *Abatement of Child Support*.—The Commentary now embodies the generally accepted practice of abating a child support obligor’s payment up to fifty percent when extended visitation of seven days or longer occurs.⁴¹

3. *Deviation for Regular Visitation*.—The Commentary recommends that a child support obligor’s payment be reduced by up to ten percent weekly in situations where the child support obligor (noncustodial parent) regularly exercises alternate weekend visitation.⁴² The Commentary cautions that such abatement should occur only after careful consideration of the particular case in issue.⁴³

4. *Tax Dependency Exemptions*.—The Commentary expands discussion of a trial court’s authority to order a custodial parent to assign tax dependency exemptions to a noncustodial parent pursuant to I.R.C. § 152(e).⁴⁴ The Commentary embodies prevailing practice by suggesting that trial courts may wish to have the custodial parent execute I.R.S. Form 8332 on an annual basis upon verification that a child support obligor is current in his obligation at the end of the year.⁴⁵ The Commentary now also sets out a minimum set of factors to be considered by a trial court when determining whether or not to order a custodial parent to release tax dependency exemptions.⁴⁶

37. Indiana Child Support Guideline 3, Commentary.

38. 600 N.E.2d 943 (Ind. 1992).

39. Indiana Child Support Guideline 6, Commentary.

40. *Id.*

41. *Id.*

42. *Id.*

43. *Id.*

44. Indiana Child Support Guidelines, Commentary to Guideline 6; *see, e.g.*, *Ritchey v. Ritchey*, 556 N.E.2d 1376 (Ind. Ct. App. 1990).

45. Indiana Child Support Guideline 6, Commentary.

46. *Id.*

5. *Transportation Costs.*—The Commentary expressly states that trial courts should not automatically order noncustodial parents to bear the entire cost of transportation related to visitation.⁴⁷ The geographic distance between the parties and their respective financial resources are among the factors relevant to the apportionment of these costs.⁴⁸

6. *Accountability of Custodial Parent for Child Support.*—The Commentary supplements section 31-1-11.5-13(e) of the Indiana Code in recognizing the need for an accounting of child support by a custodial parent for future child support received.⁴⁹ A troublesome aspect of this Commentary, however, is its recognition that a remedy for the diversion of child support by a custodial parent for personal use “is not clear.”⁵⁰

7. *Emancipation for Support Orders of Two or More Children.*—The Commentary now expressly discusses child support orders for multiple children and the impact of emancipation of one child.⁵¹ The Commentary emphasizes the frequent need to judicially amend child support orders upon emancipation.⁵²

II. LEGISLATIVE DEVELOPMENTS

In its regular session, the Indiana General Assembly passed a modest amount of significant family law legislation.⁵³

A. Grandparents' Visitation

Perhaps the most publicized piece of family law legislation approved in 1993 is the amendment to the grandparents' visitation statute.⁵⁴ Prior to July 1, 1993, the parents of a custodial parent were extremely limited in their ability to visit with their grandchildren over the objection of the custodial parent. The 1993 amendment effectively rewrote this section of the Indiana Code and permits the parent of *either* the custodial or noncustodial parent to seek visitation rights if “[t]he marriage of the child's parents has been dissolved in Indiana.”⁵⁵ The 1993 amendment also permits grandparents to seek visitation rights under a

47. *Id.*; see also *Huffman v. Huffman*, 623 N.E.2d 445 (Ind. Ct. App. 1993) (where an equal allocation of transportation costs between parents survived a constitutional equal protection challenge).

48. Indiana Child Support Guideline 6, Commentary.

49. *Id.*

50. *Id.* The Commentary suggests that perhaps “the scrutiny that comes with an accounting would itself resolve the problem.” *Id.*

51. *Id.*

52. *Id.*

53. The following sections of this Survey article briefly describe selected, notable Indiana family law legislation. A thorough review of all of the Indiana General Assembly's activities in its most recent term is recommended in order to conduct a complete analysis of all family law legislation.

54. IND. CODE § 31-1-11.7-2 (Burns Supp. 1993).

55. IND. CODE § 31-1-11.7-2(a)(2) (Burns Supp. 1993).

foreign divorce decree if the foreign decree does not bind the grandparents, or if an Indiana trial court could have jurisdiction over matters under Indiana's adaptation of the Uniform Child Custody Jurisdiction Act (known in Indiana as the Uniform Child Custody Jurisdiction Law).⁵⁶ Passed amidst a groundswell of publicity, this amendment may have a major impact on familial relationships.

B. Permanent Protective Order

The Indiana General Assembly added a new section to the Indiana Dissolution of Marriage Act⁵⁷ authorizing the issuance of a permanent protective order following a dissolution of marriage.⁵⁸ Effective July 1, 1993, trial courts may issue, upon motion supported by affidavit, a permanent protective order enjoining "a party from molesting or disturbing the peace of the other party" or to exclude "either party from the family dwelling or from the dwelling of the other party upon a showing that harm would otherwise result."⁵⁹ Despite its reference to Trial Rule 65,⁶⁰ this statute does not appear to mandate that the permanent protective order be reciprocal.⁶¹ The statute also provides for the transformation of a temporary restraining order into a permanent protective order at a final marital dissolution hearing.⁶² Issues of security and renewability of a permanent protective order are handled under existing Indiana law.⁶³ This new statute should provide a modicum of comfort to litigants who feel threatened at the conclusion of a family law proceeding, and may tend to reduce the caseload of routine protective order cases filed under sections 34-4-5.1-1 *et seq.* of the Indiana Code.

III. PROPERTY DISTRIBUTION

Property distribution under Indiana law involves three steps: identification,⁶⁴ valuation,⁶⁵ and division.⁶⁶ In 1993, Indiana trial and appellate courts continued to deal with these difficult issues, refining the definition of "property,"

56. See IND. CODE § 31-1-11.7-2(b) (Burns Supp. 1993).

57. IND. CODE § 31.1.11.5-1 *et seq.* (Burns 1987 and Supp. 1993).

58. IND. CODE § 31-1-11.5-8.2 (Burns Supp. 1993).

59. IND. CODE § 31-1-11.5-8.2(a) (Burns Supp. 1993).

60. IND. TRIAL RULE 65(E) mandates that temporary restraining orders issued in family law cases must enjoin "both parties to the action."

61. IND. CODE § 31-1-11.5-8.2 (Burns Supp. 1993).

62. IND. CODE § 31-1-11.5-8.2(b) (Burns Supp. 1993).

63. IND. CODE § 31-1-11.5-8.2(c), (d), and (e) (Burns Supp. 1993).

64. See, e.g., IND. CODE § 31-1-11.5-2(d) (Burns 1987) (defining "property").

65. See, e.g., *Eyler v. Eyler*, 492 N.E.2d 1071 (Ind. 1986), addressing the timing of valuation of property in marital dissolution actions).

66. IND. CODE § 31-1-11.5-11(c) (Burns Supp. 1993) (presuming an equal division of marital property is just and reasonable, but providing a nonexclusive list of factors that a trial court may consider to rebut this presumption).

addressing the equal division presumption, and considering the effect of bankruptcy on property distribution.

A. Statutory Determination and Division of Property

In *Leisure v. Leisure*,⁶⁷ the Indiana Supreme Court held that a former air traffic controller's federal worker's compensation benefits acquired after the filing of a petition for dissolution of marriage was not property as defined in section 31-1-11.5-2(d) of the Indiana Code. The husband, who previously had worked as an air traffic controller and had been placed on administrative status, applied for immediate medical retirement on March 29, 1989.⁶⁸ He began receiving both disability and federal worker's compensation benefits and, when forced to choose, he opted for the worker's compensation benefits.⁶⁹ The trial court found the husband's federal worker's compensation benefits to be marital property.⁷⁰ The Indiana Court of Appeals affirmed the trial court's determination,⁷¹ relying upon *Gnerlich v. Gnerlich*⁷² in concluding that federal worker's compensation benefits were analogous to the disability insurance benefits addressed in *Gnerlich*. The supreme court granted transfer and reversed the court of appeals' decision, holding that the worker's compensation benefits were future income rather than property subject to distribution as a marital asset.⁷³ The supreme court reasoned that, unlike the disability benefit in *Gnerlich*, the husband had not been required to deplete marital assets or pay premiums to acquire the worker's compensation benefits.⁷⁴ The supreme court also distinguished worker's compensation benefits from common law tort claim awards since worker's compensation benefits lack elements of pain and suffering and monetary loss, instead giving prompt and certain relief to employees.⁷⁵ The supreme court also pointed out that worker's compensation benefits are contingent upon an employee's continued disability rather than an absolute entitlement.⁷⁶ Holding that "worker's compensation benefits are not a vested property interest subject to distribution as a present marital asset, but, rather, they represent future income,"⁷⁷ the supreme court ultimately opined that pension benefits are distinguishable from worker's compensation benefits as deferred compensation, since worker's compensation benefits simply replace wages lost

67. 605 N.E.2d 755 (Ind. 1993).

68. *Id.* at 757.

69. *Id.*

70. *Id.*

71. *Leisure v. Leisure*, 589 N.E.2d 1163 (Ind. Ct. App. 1992).

72. 538 N.E.2d 285 (Ind. Ct. App. 1989) (holding that husband's disability benefits were a marital asset for distribution).

73. *Leisure*, 605 N.E.2d at 758.

74. *Id.*

75. *Id.*

76. *Id.* at 759.

77. *Id.*

due to an employee's injury. *Leisure* thus limits the statutory definition of property for marital dissolution purposes.

*Castaneda v. Castaneda*⁷⁸ dealt with the often thorny issue of the inclusion of inheritances in marital estates. During the course of the parties' marriage, the wife acquired an inheritance from her father, deposited the funds into certificates of deposit in her name, avoided commingling the inherited funds with other funds, and enjoyed substantial appreciation of the funds to the sum of \$111,762.30 by the time of the final marital dissolution hearing.⁷⁹ The trial court held that the entire value of the inheritance was the wife's "individual property" which should be awarded to her, and that the inheritance "should not be considered marital assets for purposes of dividing the marital estate."⁸⁰ The Indiana Court of Appeals affirmed the trial court's judgment, in the process rejecting the husband's argument that the trial court erroneously excluded the inheritance from the marital estate.⁸¹ In its analysis, however, the court of appeals confirmed that the inheritance was "property" within section 31-1-11.5-2(d) of the Indiana Code.⁸² The court of appeals referenced the record of the proceedings which detailed two pre-trial conferences at which the husband and the wife agreed that the inheritance was part of their divisible marital estate, leaving as the sole issue the appropriate distribution of that property.⁸³ The court of appeals noted that the trial court listed the inheritance as marital property in its order but merely set aside the entire value to the wife.⁸⁴ Finding that portions of the trial court's order may have contained misstatements that could imply that the inheritance was not marital property, the court of appeals effectively concluded that the misstatements constituted nothing more than harmless error, given the record below.⁸⁵ The court of appeals also dismissed the husband's argument that the trial court abused its discretion in awarding the entire value of the inheritance to the wife, citing section 31-1-11.5-11(c) of the Indiana Code and its specific reference to inheritance as a factor that can justify deviation from the rebuttable equal division presumption and the wife's careful segregation and treatment of the inherited funds as nonmarital property.⁸⁶ *Castaneda* affirms that inheritances are part of a marital estate, but provides authority for a substantial deviation argument regarding the percentage division of assets in a contested marital dissolution action.

78. 615 N.E.2d 467 (Ind. Ct. App. 1993).

79. *Id.* at 468-69.

80. *Id.* at 469.

81. *Id.* at 470.

82. *Id.* at 469.

83. *Id.*

84. *Id.* at 470.

85. *Id.*

86. *Id.* at 470-71.

*Hoskins v. Hoskins*⁸⁷ offers a forceful reminder that trial courts must set forth their rationale for deviating from the equal division presumption.⁸⁸ The parties agreed that the husband received more than fifty percent of the value of the parties' marital estate under the divorce decree, but the trial court failed to enter any findings explaining its reasons for deviating from an equal division.⁸⁹ The Indiana Court of Appeals reversed and remanded the trial court's approximate 56%/44% distribution and explained that the question of whether a deviation is substantial or not depends upon the size of the marital estate.⁹⁰ The court of appeals opined that "[t]he less property one has, the dearer the property is."⁹¹ In the final analysis, the court of appeals determined that an approximate \$1,600.00 deviation in a marital estate valued at \$26,245.71 was substantial.⁹²

*McGinley-Ellis v. Ellis*⁹³ reaffirms the principle that a trial court must explain a substantially unequal division of a marital estate. The husband owned 162 shares of stock in a family business, and the trial court included in the parties' marital estate only the appreciation on the 22 shares of stock the husband brought into the marriage.⁹⁴ The husband requested specific findings pursuant to Trial Rule 52(A),⁹⁵ and the trial court found that the 140 shares of stock gifted to the husband during the course of the parties' marriage were intended solely for the husband and that the value of the other 22 shares of stock was disputed, based upon the uncertainty as to the identity of the donees.⁹⁶ The trial court awarded the husband approximately 87% of the parties' \$231,000 net marital estate purporting to give the wife 60% of the net value.⁹⁷ The court of appeals reversed the trial court's judgment, finding the trial court's calculation of the 162 shares of stock in the marital estate at \$9,331 clearly erroneous in light of the husband's testimony that the 162 shares were worth \$186,500.⁹⁸ The court of appeals found it "axiomatic that the source of the stock has no impact upon its value."⁹⁹ In including only \$9,331 of the nearly \$190,000 value

87. 611 N.E.2d 178 (Ind. Ct. App. 1993).

88. IND. CODE § 31-1-11.5-11(c) (Burns Supp. 1993); *see also In re Marriage of Coomer*, 622 N.E.2d 1315 (Ind. Ct. App. 1993) (reversing a 60%/40% distribution on the basis of the trial court's erroneous valuation of marital assets).

89. *Hoskins*, 611 N.E.2d at 179; *see also In re Marriage of Davidson*, 540 N.E.2d 641 (Ind. Ct. App. 1989); *Kirkman v. Kirkman*, 555 N.E.2d 1293 (Ind. 1990).

90. *Hoskins*, 611 N.E.2d at 180.

91. *Id.* (citing Mark 12:41-44).

92. *Id.* at 179-80.

93. 622 N.E.2d 213 (Ind. Ct. App. 1993).

94. *Id.* at 216. The 162 shares of stock the husband owned were worth approximately \$190,000. *Id.* In contrast, the appreciation the trial court included in the marital estate was worth only \$9,331. *Id.*

95. *Id.* at 218.

96. *Id.*

97. *Id.* at 216.

98. *Id.* at 219.

99. *Id.*

of the stock in the parties' marital estate, the court of appeals found the trial court had abused its discretion by "effectively and systematically" excluding marital assets from the marital estate.¹⁰⁰ The court of appeals also noted the trial court's conflicting findings as to the wife's substantial contributions as a homemaker and her lower future income earning capacity as making "it impossible to discern which party rebutted the statutory presumption."¹⁰¹ Ultimately, the court of appeals held that the trial court's findings were insufficient under Trial Rule 52 and, remanding with instructions to include all 162 shares of stock in the marital estate, instructed the trial court to either follow the statutory presumption of equal division of property or set forth its rationale for not doing so.¹⁰²

*B. Antenuptial Agreements and the Abolishment of Presumption
of Undue Influence in Interspousal Transactions*

In *Womack v. Womack*,¹⁰³ the Indiana Supreme Court abolished the common law presumption of undue influence in interspousal transactions. The husband (age 85 at trial) and the wife (age 78 at trial) married on January 29, 1988, and executed a purported "Pre-Nuptial Agreement" on February 8, 1988, in which the husband agreed to support and maintain the wife in a suitable home, consistent with his financial ability.¹⁰⁴ The "Pre-Nuptial Agreement" also permitted either party to gift property to the other party.¹⁰⁵ On September 14, 1990, the husband closed a transaction for the purchase of a house in Mitchell, Indiana, and deeded the house to the wife contemporaneous with the closing.¹⁰⁶ In October, 1990, the husband petitioned to dissolve his marriage to the wife.¹⁰⁷ In the absence of evidence of deception or undue influence, the trial court determined that the husband had gifted the Mitchell, Indiana house to the wife.¹⁰⁸ The court of appeals affirmed the trial court's award of the Mitchell, Indiana house to the wife.¹⁰⁹ The Indiana Supreme Court vacated the court of appeals' decision, calling the presumption of undue influence in interspousal transactions "an antiquated rule of law." The court held that Indiana law no longer recognizes a presumption of undue influence in interspousal transactions on the basis of the confidential relationship or showing the dominant spouse benefitted from the transaction, and declared that the spouse seeking to set aside

100. *Id.*

101. *Id.*

102. *Id.*

103. 622 N.E.2d 481 (Ind. 1993).

104. *Id.* at 482.

105. *Id.*

106. *Id.* at 483.

107. *Id.*

108. *Id.*

109. *Id.*; see also *Womack v. Womack*, 605 N.E.2d 221 (Ind. Ct. App. 1992), *reh'g denied*.

the transaction has the burden of proving that the other spouse exercised undue influence.¹¹⁰

C. Injunctive Relief

*Kennedy v. Kennedy*¹¹¹ involved a claim by the wife that her husband had either misrepresented or failed to disclose the true value of his pension and retirement benefits. Following the conclusion of her marital dissolution action, the wife sought to set aside the dissolution decree, alleging fraud and undue influence.¹¹² Shortly thereafter, the wife moved for a preliminary injunction to enjoin the husband from dissipating his pension pending resolution of her fraud allegations.¹¹³ The trial court held a nonevidentiary hearing and, on January 4, 1993, enjoined the husband from removing, transferring, or disposing of his pension and retirement benefits.¹¹⁴ The court of appeals affirmed the issuance of the preliminary injunction, noting the vast discretion the trial court has in considering whether to issue equitable relief.¹¹⁵ The court of appeals rejected as harmless error the husband's argument that a two-month delay in entering special findings following the issuance of the preliminary injunction was prejudicial.¹¹⁶ While the court of appeals agreed with the husband's position that injunctive relief is improper when an applicant cannot demonstrate the present existence of an actual threat of harm, it found that the parties' pleadings and discovery requests provided the trial court with the foundation necessary to support a grant of injunctive relief.¹¹⁷ To support the trial court's issuance of the preliminary injunction, the court of appeals noted that the husband had asserted that the wife was not entitled to more than the \$1,000 per month required by the terms of the divorce decree and that he had not been readily forthcoming in providing requested valuation information.¹¹⁸ The court of appeals further rejected the husband's claims that his pension could not be the subject of injunctive relief, distinguishing *Selke v. Selke*¹¹⁹ on the basis that the husband deliberately misrepresented the pension's value, rather than failing to volunteer information regarding the pension's value as in *Selke*. Finally, the court of appeals confirmed the trial court's issuance of the preliminary injunction without requiring the wife to post security as appropriate.¹²⁰ *Kennedy* illus-

110. *Womack*, 622 N.E.2d at 483.

111. 616 N.E.2d 39 (Ind. Ct. App. 1993), *trans. denied*.

112. *Id.* at 41.

113. *Id.*

114. *Id.*

115. *Id.*

116. *Id.* at 42.

117. *Id.* at 42-43.

118. *Id.* at 43.

119. 600 N.E.2d 100 (Ind. 1992).

120. *Id.* at 43-44.

trates the broad discretion trial courts enjoy when fashioning methods to preserve marital property.

D. Bankruptcy and Property Distribution

*Reich v. Reich*¹²¹ addressed the issue of whether a state court has concurrent jurisdiction with the bankruptcy court to grant relief from the automatic stay provision of the United States Bankruptcy Code.¹²² In *Reich*, the wife received a \$27,000 judgment, payable in 72 monthly installments of \$302.19, as well as relief from two bank loans as part of the court order equalizing property division.¹²³ The trial court characterized the judgment in the nature of additional child support and nondischargeable.¹²⁴ Shortly after the wife filed a motion to enforce payment of the bank loans, the husband filed a voluntary petition for Chapter 7 bankruptcy and ceased making the payments on the bank loans because of the automatic stay provision of the bankruptcy code.¹²⁵ The trial court ultimately found the husband in contempt for failing to make the bank loan payments and awarded attorneys' fees to the wife.¹²⁶

The husband claimed on appeal that the trial court did not have subject matter jurisdiction to find him in contempt because the bank loan payments were stayed by the automatic stay provisions of the bankruptcy code.¹²⁷ The court of appeals agreed and reversed the trial court's ruling on this issue, finding that the trial court did not have jurisdiction to grant relief from the bankruptcy stay.¹²⁸ The court of appeals distinguished the trial court's concurrent jurisdiction with the bankruptcy court on issues of dischargeability of debts from the bankruptcy court's exclusive jurisdiction over the automatic stay issue.¹²⁹ The court of appeals affirmed the award of attorneys' fees to the wife but remanded to the trial court for recalculation of the award in an amount consistent with issues over which the trial court had jurisdiction.¹³⁰ *Reich* reveals the complexities inherent in dealing with bankruptcy issues and shows the dramatic impact that federal law can occasionally have on marital dissolution actions.

121. 605 N.E.2d 1178 (Ind. Ct. App. 1993).

122. 11 U.S.C. § 362 (1988 & Supp. 1992).

123. *Reich*, 605 N.E.2d at 1179.

124. *Id.*

125. *Id.* at 1179-80.

126. *Id.* at 1181.

127. *Id.* at 1181-82.

128. *Id.* at 1183.

129. *Id.*

130. *Id.*

IV. CHILDREN'S ISSUES

A. Child Custody

1. *What Legal Standard Should Apply When Modifying Joint Legal Custody?*—In *In re Marriage of Richardson*,¹³¹ the Indiana Supreme Court extended its analysis of the legal standard applicable to the modification of joint legal custody arrangements from its landmark *Lamb v. Wenning*¹³² decision. In *Richardson*, the 1988 settlement agreement provided for joint legal custody of the parties' twin eight-year-old sons with the mother designated as having primary physical custody.¹³³ In 1991, the trial court conducted an extensive evidentiary hearing and changed primary physical custody of the children to the father while maintaining the joint legal custody arrangement.¹³⁴ The court of appeals reversed the trial court's modification, finding the custodial modification an abuse of the trial court's discretion.¹³⁵

The Indiana Supreme Court reversed the court of appeals' decision and reinstated the trial court's modification, emphasizing the "clearly erroneous" standard for reversing trial court determinations and giving priority to a trial court's ability to weigh the credibility of witnesses.¹³⁶ In adhering to this standard of review, the supreme court noted that expert testimony, combined with the persuasive in-chambers testimony of the 12-year-old twin boys, established "changed circumstances so substantial and continuing as to make the original residential arrangement unreasonable."¹³⁷ The supreme court rejected the mother's argument that she was denied due process because of her inability to cross-examine letters sent to the trial court by a testifying psychologist after the conclusion of evidence, noting that the trial court's modification order did not reference the letters and that the mother did not move to strike the letters or reopen the evidence.¹³⁸ Justice De Bruler authored a concurring opinion taking issue with the majority opinion's implication that a change in circumstances of a nonresidential parent, standing alone, might support a custody modification.¹³⁹ *Richardson* opens several avenues for seeking modifications of joint

131. 622 N.E.2d 178 (Ind. 1993).

132. 600 N.E.2d 96 (Ind. 1992).

133. *Richardson*, 622 N.E.2d at 178-79.

134. *Id.* at 179.

135. *Richardson v. Morgan*, 612 N.E.2d 157 (Ind. Ct. App. 1993).

136. *Richardson*, 622 N.E.2d at 179; *see also* IND. TRIAL RULE 52(A) (a trial court's judgment should not be set aside "unless clearly erroneous, and due regard should be given to the opportunity of the trial court to judge the credibility of the witnesses.").

137. *Richardson*, 622 N.E.2d at 179 (quoting *Lamb*, 600 N.E.2d at 98).

138. *Id.* at 180.

139. *Id.* at 180-81 (De Bruler, J., concurring). For further discussion of Justice De Bruler's point, *see* *Pierce v. Pierce*, 620 N.E.2d 726, 729 (Ind. Ct. App. 1993) (concluding that a trial court may consider the noncustodial parent's circumstances in determining whether to modify a custody

legal custody arrangements, including heightening the relevance and appropriateness of the in-chambers interview procedure for young children, emphasizing the import of testimony by mature pre-teenagers, and reaffirming the vast discretion granted trial courts in custodial matters.

2. *The Developing Interpretation of Indiana's Version of the Uniform Child Custody Jurisdiction Act.*—The year 1993 saw several significant cases related to Indiana's version of the Uniform Child Custody Jurisdiction Act, known as the Uniform Child Custody Jurisdiction Law ("UCCJL").¹⁴⁰ *Williams v. Williams*¹⁴¹ involved a husband and wife who were married in North Carolina and who lived in North Carolina throughout their marriage.¹⁴² Upon separation, the wife and one of the parties' two daughters, Amber, moved to Muncie, Indiana.¹⁴³ The wife subsequently filed a petition for dissolution of marriage in Indiana, and the trial court granted the mother immediate temporary custody of both Amber and Amanda, the daughter who had never left North Carolina.¹⁴⁴ The husband objected to the trial court's attempted assertion of *in personam* jurisdiction over him and its subject matter jurisdiction to determine custody of Amanda.¹⁴⁵ Following a hearing, the trial court acknowledged that it did not have *in personam* jurisdiction over the husband and refused to grant the wife's petition for dissolution of marriage, but confirmed its prior order granting the wife temporary custody of Amanda.¹⁴⁶

The court of appeals reversed, holding that Indiana did not have jurisdiction over Amanda's custody dispute.¹⁴⁷ The court of appeals determined that the "significant connection" test found in the UCCJL¹⁴⁸ was inapplicable since it is appropriate only when the "home state" test under the UCCJL¹⁴⁹ is inapplicable.¹⁵⁰ The court of appeals ultimately found that North Carolina was the "home state" of Amanda and, thus, that Indiana did not have jurisdiction over her custody dispute.¹⁵¹

arrangement, but finding no Indiana case which modified custody on the primary basis of improvements in the noncustodial parent's fitness as a parent). *See also* Herrmann v. Herrmann, 613 N.E.2d 471, 473-74 (Ind. Ct. App. 1993).

140. IND. CODE § 31-1-11.6-1 *et seq.* (Burns 1987 & Supp. 1993).

141. 609 N.E.2d 1111 (Ind. Ct. App. 1993).

142. *Id.* at 1112.

143. *Id.*

144. *Id.*

145. *Id.*

146. *Id.*

147. *Id.* at 1113-14.

148. IND. CODE § 31-1-11.6-3(a)(2) (Burns 1987).

149. IND. CODE § 31-1-11.6-2(5) (Burns 1987).

150. *Williams*, 609 N.E.2d at 1113.

151. *Id.* at 1113-14. *Cf.* Ward v. Ward, 611 N.E.2d 167, 169 (Ind. Ct. App. 1993), *trans. denied*, (an Indiana trial court can modify a foreign custody order when the foreign jurisdiction declines to exercise jurisdiction because of a child's physical presence in Indiana).

In *Matter of E.H.*,¹⁵² the Indiana Court of Appeals held that a trial court considering a “children in need of services” (“CHINS”) proceeding must exercise its jurisdiction within the framework and policy considerations of Indiana’s version of the UCCJL. The court of appeals rejected a claim that the UCCJL conflicted with the CHINS statute,¹⁵³ noting that the CHINS statute does not control interstate jurisdiction disputes.¹⁵⁴ *Matter of E.H.* affirms the priority of the UCCJL in connection with all multiple jurisdiction custodial questions.

*Ruppen v. Ruppen*¹⁵⁵ deals with the complex issue of international custodial disputes. The mother, a United States citizen, and the father, an Italian citizen, married in Floyd County, Indiana, in 1987 and moved to Italy shortly thereafter.¹⁵⁶ Two daughters were born of the marriage, enjoying dual Italian and United States citizenships, but always living in Italy.¹⁵⁷ The daughters’ contact with the United States was limited to summer vacations with their maternal grandparents in Indiana.¹⁵⁸ In 1992, the mother and daughters visited Indiana, and the mother filed a verified petition for custody and child support after having been in Indiana for 97 days.¹⁵⁹ The next day, the father petitioned for a writ of habeas corpus seeking physical custody of his daughters so that custody could be determined in Italy.¹⁶⁰ The father also filed a motion to dismiss the mother’s petition for custody.¹⁶¹ The trial court dismissed the mother’s petition on the basis of a lack of jurisdiction and ordered the mother to transfer physical custody of the children to the father so he could return them to Italy for a custody determination.¹⁶²

The court of appeals affirmed the trial court’s determination, holding that a foreign country is a “state” for purposes of the UCCJL and that Italy was the “home state” of the daughters.¹⁶³ The court of appeals reaffirmed the inapplicability of the “significant connection” test when a “home state” for children can be determined under the UCCJL.¹⁶⁴ Ultimately, the court of appeals concluded that the mother had failed to show either that Italy did not have jurisdiction to determine child custody under its own laws, or that she would be denied due process if forced to litigate custody in an Italian forum.¹⁶⁵

152. 612 N.E.2d 174, 182 (Ind. Ct. App. 1993), *opinion adopted by* *Matter of E.H.*, 624 N.E.2d 471 (Ind. 1993).

153. IND. CODE § 31-6-2-1 *et seq.* (Burns 1987 & Supp. 1993).

154. *Matter of E.H.*, 612 N.E.2d at 182-83.

155. 614 N.E.2d 577 (Ind. Ct. App. 1993).

156. *Id.* at 580.

157. *Id.*

158. *Id.*

159. *Id.*

160. *Id.*

161. *Id.*

162. *Id.*

163. *Id.* at 582.

164. *Id.* at 581.

165. *Id.* at 582; *see also* *Horlander v Horlander*, 579 N.E.2d 91 (Ind. Ct. App. 1991).

The mobility of society today makes the UCCJL and its provisions all the more important. Sometimes peculiar fact patterns invoke UCCJL jurisdiction. *Matter of Paternity of Robinaugh*¹⁶⁶ involved a motion by the mother, a resident of Arizona, to dismiss the father's petition to establish paternity. The mother and father were living together in Arizona when the mother became pregnant.¹⁶⁷ Without notice, the mother relocated to Fort Wayne, Indiana, where she gave birth to a son.¹⁶⁸ The mother planned to permit the child to be adopted, but the father intervened with the filing of a paternity action in Arizona.¹⁶⁹ The father later filed a paternity action in Whitley County, Indiana.¹⁷⁰ The mother moved to dismiss the father's petition, and the trial court denied the motion, resulting in an interlocutory appeal.¹⁷¹

The Indiana Court of Appeals affirmed the trial court's denial of the mother's motion to dismiss, holding that the UCCJL governed the question of jurisdiction of this paternity proceeding.¹⁷² In noting that the UCCJL governs "custody proceedings" with an interstate dimension, the court of appeals concluded that the UCCJL governs all interstate proceedings in which child custody is one of the issues.¹⁷³ The court of appeals further determined that Indiana was the "home state" of the child and that Indiana had jurisdiction under the UCCJL, thereby rejecting the mother's claim that Indiana was an inconvenient forum.¹⁷⁴

3. *The Interplay Between Religion and Custody.*—*Johnson v. Nation*¹⁷⁵ is an extremely significant opinion from the Indiana Court of Appeals. In *Johnson*, the parents divorced in 1985 and the trial court awarded the father sole custody of the parties' two children, granting the mother reasonable visitation rights.¹⁷⁶ In 1987, the parties modified the custodial provisions to provide the mother more liberal visitation.¹⁷⁷ The father petitioned in 1990 to modify the mother's new visitation schedule, alleging that the modified visitation arrangements served neither the best interests of the children nor the best interests of the parties.¹⁷⁸ The mother responded with a petition requesting sole custody of the chil-

166. 616 N.E.2d 409 (Ind. Ct. App. 1993).

167. *Id.* at 410.

168. *Id.*

169. *Id.*

170. *Id.*

171. *Id.*

172. *Id.* at 410-11.

173. *Id.* at 411.

174. *Id.* at 411-12.

175. 615 N.E.2d 141 (Ind. Ct. App. 1993).

176. *Id.* at 143.

177. *Id.*

178. *Id.*

dren.¹⁷⁹ The trial court heard the cross-petitions for modification and granted the mother sole custody of the children.¹⁸⁰

The court of appeals reversed the trial court's determination, reaffirming that a custody modification must be granted only upon "a showing of changed circumstances so substantial and continuing as to make the existing custody order unreasonable."¹⁸¹ The court of appeals differentiated this standard from the "best interest" test for an initial custody determination set forth in section 31-1-11.5-21(a) of the Indiana Code.¹⁸² Rejecting the claim that the father's control over religious matters warranted a change of custody, the court of appeals noted that a noncustodial parent may not impose his religious views on a child and held that the father's enhanced religious involvement, standing alone, did not support a custodial modification.¹⁸³ The court of appeals also found that the father's attempts to "block the transfer" of the mother's beliefs, attitudes, and values did not support a custody modification.¹⁸⁴ Interestingly, the court of appeals found that the father had interfered with the mother's visitation.¹⁸⁵ However, the court of appeals reasoned that the interference did not rise to a level to support a custody modification and returned custody of the parties' children to the father.¹⁸⁶ The *Johnson* court further held that the trial court did not err in refusing to order the mother to take the children to religious functions sanctioned by the father during her visitation.¹⁸⁷ The interferences to the mother's visitation by the interruption for those activities, the court of appeals concluded, would be unreasonable.¹⁸⁸

4. *Equal Protection Arguments and Transportation Issues.*—*Huffman v. Huffman*¹⁸⁹ considered an equal protection challenge to a trial court's order apportioning transportation expenses related to visitation. The father and mother shared joint legal custody of their children, and the 1985 court order provided that the mother would receive sole legal custody if either she or the father moved more than 5 miles away from their Greencastle, Indiana home.¹⁹⁰ Upon the mother's proposed relocation 175 miles away from Greencastle, Indiana, the father petitioned for a custody modification.¹⁹¹ The trial court denied the mother's motion to dismiss, ordered that the mother have sole custody of the

179. *Id.*

180. *Id.*

181. *Id.*; IND. CODE § 31-1-11.5-22(d) (Burns 1993).

182. *Johnson*, 615 N.E.2d at 143.

183. *Id.* at 145-46.

184. *Id.* at 146.

185. *Id.* at 147.

186. *Id.*

187. *Id.*

188. *Id.* at 149.

189. 623 N.E.2d 445 (Ind. Ct. App. 1993).

190. *Id.* at 447.

191. *Id.*

children, and divided equally the financial responsibility for providing transportation related to the father's visitation.¹⁹² The court of appeals affirmed the trial court's judgment denying the mother's motion to dismiss.¹⁹³ In its analysis, the court of appeals rejected the mother's contention that the trial court's transportation order violated the equal protection clause, noting that the mother admitted that the new visitation order imposed the same transportation obligations upon her as it did upon the father.¹⁹⁴

B. Child Support

1. *Court-Ordered Child Support Payments Cannot Exceed the Amounts Prescribed by the Indiana Child Support Rules and Guidelines.*—*Kinsey v. Kinsey*¹⁹⁵ set forth this proposition in a situation where, upon a modification petition, the trial court found the father's child support obligation under the Guidelines to be \$80.00 weekly.¹⁹⁶ The trial court deviated from the Guidelines amount and ordered the father to pay \$140.00 weekly in child support, basing its determination, in part, upon the desire to mitigate the perceived detrimental impact of implementing an immediate reduction in child support from \$200.00 to \$80.00 weekly.¹⁹⁷ The court of appeals reversed and held that the Indiana Child Support Rules and Guidelines do not contemplate deviations from Guidelines child support in excess of the Guidelines amount.¹⁹⁸ The court of appeals, however, noted that a child support obligor can bind himself by agreement to pay child support in excess of what the trial court could order if it crafted the award or can make voluntary payments that exceed the amount prescribed by the Guidelines.¹⁹⁹

Closely related is the case of *In re Marriage of Loeb*,²⁰⁰ in which the court of appeals enforced a father's obligation under a settlement agreement to pay child support past age 21 and through the completion of a child's college education.²⁰¹ In enforcing the child support order, the court of appeals noted the lack of ambiguity in the father's agreement to pay child support until his daughter graduated from an accredited four-year college program unless she earlier married, died, or became emancipated.²⁰² Taken together, *Kinsey* and *Loeb* clarify the limits of the Indiana Child Support Rules and Guidelines while

192. *Id.*

193. *Id.* at 450.

194. *Huffman*, 623 N.E.2d at 449; *see also* U.S. CONST. amend. XIV, § 1, commanding that no State shall "deny to any person within its jurisdiction the equal protection of the laws."

195. 619 N.E.2d 929 (Ind. Ct. App. 1993).

196. *Id.* at 931.

197. *Id.*

198. *Id.* at 933.

199. *Id.* at 934.

200. 614 N.E.2d 954 (Ind. Ct. App. 1993).

201. *Id.* at 955-56.

202. *Id.* at 957.

acknowledging parents' freedom of contract and voluntary right to make excess child support contributions.

2. *Child Support Abatement When Children Live at College*.—*In re Marriage of Tearman*²⁰³ dealt principally with the issue of abatement of child support during a child's on-campus college attendance. In remanding to the trial court for a determination of the appropriate amount of the abatement of child support while the parties' daughter attended college and resided on campus, the court of appeals noted that the trial court must address the issue of full or partial abatement of child support when a noncustodial parent is obligated to pay a share of the child's on-campus "board."²⁰⁴ *Tearman* reaffirms the great latitude trial courts possess in determining what, if any, abatement should occur when a child is away from home and living at college and provides guidance that *some* abatement is likely in order.²⁰⁵

3. *Weekly Gross Income*.—In *McGinley-Ellis v. Ellis*,²⁰⁶ the Indiana Court of Appeals continued its examination of the concept of weekly gross income for the self-employed. The trial court determined that the father, the president and majority stockholder of a family corporation, controlled his compensation, but only considered the father's salary and "in kind" compensation in its child support calculation.²⁰⁷ The court of appeals determined the trial court's methodological treatment of the father as an "employee" of the corporation to be error and remanded for a recalculation of child support.²⁰⁸ The court of appeals pointed out, however, that the father's majority in stockholder status, the corporation's rent payments to purchase real estate, and the father's line of credit from the corporation all were relevant factors to be considered in the child support calculation.²⁰⁹ *McGinley-Ellis* offers much needed guidance on the issue of weekly gross income for the self-employed and realistically considers the "in-kind" benefits enjoyed by many business careers.²¹⁰

4. *The 20% Rule*.—Sections 31-1-11.5-17(a)(2)(A) and (B) of the Indiana Code provide that a child support obligor's child support obligation shall be modified if the current child support amount differs by more than 20% from that

203. 617 N.E.2d 974 (Ind. Ct. App. 1993).

204. *Id.* at 977.

205. The Commentary to Indiana Child Support Guideline 6 recommends a 50% abatement in certain situations.

206. 622 N.E.2d 213 (Ind. Ct. App. 1993).

207. *Id.* at 220.

208. *Id.*

209. *Id.* at 220-22. The court of appeals, on an unrelated point, refused to inject itself into the role of arbiter in a dispute over preschool tuition and parochial school education expense, noting that the parties' joint legal custody arrangement meant that the parents should make decisions related to their children jointly or seek a custody modification. *Id.* at 223-24; *see also* IND. CODE § 31-1-11.5-21(f) (Burns 1987 & Supp. 1993) (defining the role of joint legal custodians).

210. *See also* *Forbes v. Forbes*, 610 N.E.2d 885 (Ind. Ct. App. 1993) (confirming that a child support obligor's social security disability benefits are includable in his gross income for child support calculation purposes).

presumed by the Indiana Child Support Rules and Guidelines and if the trial court order establishing the current child support obligation was entered more than 12 months from the date of the modification petition.²¹¹ *In re Marriage of Brown*²¹² confirms the mandatory nature of this statutory provision. In *Brown*, the court of appeals reversed the trial court's refusal to either honor the "20% rule" or set forth its rationale for not doing so.²¹³

5. *Uniform Reciprocal Enforcement of Support Act.—Burke v. Burke*²¹⁴ added to the development of Indiana case law interpreting Indiana's version of the Uniform Reciprocal Enforcement of Support Act ("URES A").²¹⁵ The parties were divorced by an Indiana trial court in 1976 with a subsequent 1981 child support modification occurring in the trial court.²¹⁶ The mother later registered the Indiana decree in Illinois following the father's relocation to that state, and an Illinois trial court modified the father's child support obligation.²¹⁷ The father then moved back to Indiana and, in 1991, filed a verified petition to terminate and abate child support following the parties' youngest child reaching 18 years of age.²¹⁸ The Indiana trial court concluded that it retained subject matter jurisdiction over the case and that the previous Indiana orders were registered in Illinois for enforcement purposes only.²¹⁹ The trial court also found that the father had accrued a \$48,500.49 child support arrearage.²²⁰

The court of appeals reversed and remanded, in the process setting forth a relevant analysis of URES A.²²¹ The court of appeals noted that Indiana had adopted URES A, while Illinois had adopted a version of the Revised Uniform Reciprocal Enforcement of Support Act ("RURES A").²²² Under principles of comity and full faith and credit, the court of appeals determined that Illinois' RURES A governed this case.²²³ Illinois' RURES A, the court of appeals analyzed, contained an antisupersession clause which provided for a prospective modification of child support.²²⁴ After reviewing Illinois precedent, the court of appeals held that the prior order of the Illinois trial court provided for a modification of the Indiana decree.²²⁵ Having concluded that the Illinois trial court shared both subject matter jurisdiction and *in personam* jurisdiction, the

211. IND. CODE § 31-1-11.5-17(a)(2)(A) and (B) (Burns Supp. 1993).

212. 609 N.E.2d 1173 (Ind. Ct. App. 1993).

213. *Id.* at 1174.

214. 617 N.E.2d 959 (Ind. Ct. App. 1993).

215. IND. CODE § 31-2-1-1 *et seq.* (Burns 1987 & Supp. 1993).

216. *Burke*, 617 N.E.2d at 961.

217. *Id.*

218. *Id.*

219. *Id.* at 961-62.

220. *Id.* at 962.

221. *Id.* at 966.

222. *Id.*

223. *Id.*

224. *Id.* at 963.

225. *Id.* at 964.

court of appeals found that the Indiana trial court, under principles of full faith and credit, was required to enforce the intervening Illinois order to the exclusion of the prior Indiana decree.²²⁶ Thus, the court of appeals held that the Indiana trial court erred in calculating the father's arrearage solely on the basis of the Indiana decree without consideration of the Illinois modification.²²⁷ As to the prospective modification, however, the court of appeals held that the Indiana trial court had the authority to modify the father's duty of child support, noting the continuing jurisdiction of an Indiana court to modify child support during the minority of a child, and determining that principles of comity did not preclude this action.²²⁸ Judge Barteau concurred in the result, reasoning that the language of Illinois' RUESA did not grant the Illinois trial court the authority to modify the Indiana decree,²²⁹ but that the act of registering the Indiana decree in Illinois vested the Illinois court with that authority.²³⁰

Spousal maintenance also falls within the reach of URESA, according to the Indiana Court of Appeals. In *Legge v. Legge*,²³¹ a South Carolina divorce decree provided a monthly "alimony" award to the wife.²³² Upon the husband's relocation to Indiana and failure to make the required alimony payments, the wife filed an enforcement action in Indiana under URESA.²³³ Following a hearing, the trial court found the husband in contempt, fixed an arrearage, and established a revised payment schedule.²³⁴ The court of appeals affirmed the trial court's judgment, holding that orders for spousal maintenance may be enforced by contempt.²³⁵ In its analysis, the court of appeals specifically determined that URESA extends to the enforcement of spousal maintenance orders.²³⁶ Acknowledging the past ambiguity in Indiana law regarding the use of the term "alimony," the court of appeals defined alimony as "the sustenance or support of the wife by her divorced husband,"²³⁷ and noted that the South Carolina definition of alimony definitively brought that concept within the scope and jurisdictional reach of URESA.²³⁸

226. *Burke*, 617 N.E.2d at 964.

227. *Id.*

228. *Id.* at 965.

229. *Id.* at 966 (Barteau, J. concurring).

230. *Id.*

231. 618 N.E.2d 50 (Ind. Ct. App. 1993).

232. *Id.*

233. *Id.*

234. *Id.* at 50-51.

235. *Id.* at 51. For a more detailed discussion of the contempt process as well as the standard applicable to a child support modification, see *Kirchoff v. Kirchoff*, 619 N.E.2d 592 (Ind. Ct. App. 1993).

236. *Legge*, 618 N.E.2d at 51.

237. *Id.* (quoting *Black's Law Dictionary* 67 (5th ed. 1979)).

238. *Legge*, 618 N.E.2d at 51.

6. *The Discretionary, Nonrestrictive Nature of Private School Educational Expenses.*—*Moss v. Frazer*²³⁹ dealt with a 1979 divorce decree that ordered the father to pay “educational expenses” for a child. The court of appeals affirmed the trial court’s order that the father pay a portion of the child’s future private educational expenses but reversed the portion of the trial court’s order which sought to compel the father to reimburse the mother for expenses incurred prior to the filing of the modification petition.²⁴⁰ The court of appeals based its ruling on the trial court’s broad discretion to award future educational expenses and the fact that the ambiguous original order did not cover private educational expenses.²⁴¹ *Moss* clarifies and reaffirms firmly-embedded Indiana legal principles regarding private educational expenses.

V. MISCELLANEOUS

Aspects of at least four 1993 Indiana appellate court family law opinions do not fit squarely into any particular category, but contain noteworthy elements.

*Bartrom v. Adjustment Bureau, Inc.*²⁴² considered the vitality of the doctrine of necessities in Indiana. A 1989 automobile accident rendered the husband comatose.²⁴³ His separated wife, the appellant in this action, failed to visit her husband in the hospital and did not participate in economic or life support discussions related to her spouse.²⁴⁴ The husband subsequently died, and the appellee collection agency pursued payment from the wife.²⁴⁵ In the ensuing lawsuit, the trial court entered judgment against the wife in the amount of \$79,812.55.²⁴⁶ The court of appeals reversed and remanded with instructions to grant the wife’s motion for summary judgment.²⁴⁷

The Indiana Supreme Court vacated the court of appeals’ opinion and remanded for reconsideration.²⁴⁸ The supreme court traced the history of the doctrine of necessities, noting that common law permitted wives to purchase necessities on their husbands’ credit since wives could not contract or be sued in their own right.²⁴⁹ Over time, a gender-neutral rule developed making the duty of spousal support mutually enforceable by imposing secondary liability on each spouse for the payment of necessary debts of the other.²⁵⁰ The supreme

239. 614 N.E.2d 969, 970 (Ind. Ct. App. 1993).

240. *Id.* at 972.

241. *Id.*

242. 618 N.E.2d 1 (Ind. 1993).

243. *Id.* at 2.

244. *Id.* at 2-3.

245. *Id.* at 3.

246. *Id.*

247. *Bartrom*, 618 N.E.2d at 3. See *Bartrom v. Adjustment Bureau, Inc.*, 600 N.E.2d 1369 (Ind. Ct. App. 1992).

248. *Bartrom*, 618 N.E.2d at 10.

249. *Id.* at 3-4.

250. *Id.* at 4.

court agreed with this reformulation of the doctrine of necessities and the primary and secondary liability distinction for contracts entered by one spouse in an individual capacity.²⁵¹ However, the supreme court disagreed with the approach adopted by the court of appeals and held that each spouse is primarily liable for his or her independent debts, but the creditor may look to the noncontracting spouse for satisfaction of a debt under limited secondary liability (*i.e.*, the ability of the noncontracting spouse to pay at the time the debt was incurred).²⁵² The supreme court noted that the duty of spousal support continues at least until the marriage is dissolved.²⁵³ The supreme court also held that rules regarding marital misconduct, applied in a gender-neutral manner, continue to limit a spouse's common law duty of support.²⁵⁴ *Bartrom* will understandably have a significant impact on interspousal relationships and relationships between spouses and third-party creditors in the future.

*McGinley-Ellis v. Ellis*²⁵⁵ also addresses Indiana's treatment of dependency tax exemptions for minor children. The court of appeals, in considering the trial court's order that the mother execute a waiver of the children's dependency tax exemptions "for all future years," concluded that the trial court could later modify its order by directing that the father refrain from attaching I.R.S. Form 8332 to his tax returns for subsequent years, thus returning the dependency tax exemptions to the mother.²⁵⁶ Although the court of appeals' opinion appears to have been carefully researched, the practical problems in clarifying this issue to the I.R.S. upon modification seem endless given the Service's bureaucratic structure.

*Fager v. Hundt*²⁵⁷ held that parental tort immunity is not applicable to an action predicated upon a claim of intentional felonious conduct.²⁵⁸ In confirming this limit on that doctrine, the Indiana Supreme Court held that "discovery" of a cause of action by a child's parent, even absent actual cognition or memory by a child, cannot limit a claim premised upon an intentional felonious act by a parent.²⁵⁹ The supreme court added that an exception based upon fraudulent conduct is available to estop a parent from asserting a statute of limitations defense, opining that a plaintiff must exercise due diligence in commencing an action after a child becomes an adult and knows or should have discovered that

251. *Id.* at 5. See also IND. CODE § 31-1-11.5-7(d) (Burns 1987 & Supp. 1993) (temporary maintenance); IND. CODE § 31-1-11.5-11(e) (Burns 1987 & Supp. 1993) (post-dissolution maintenance); IND. CODE § 31-7-11-1 (Burns 1987) (actions for spousal support not attendant to dissolution).

252. *Bartrom*, 618 N.E.2d at 8.

253. *Id.* at 8-9.

254. *Id.* at 9-10.

255. 622 N.E.2d 213 (Ind. Ct. App. 1993).

256. *Id.* at 224-25.

257. 610 N.E.2d 246 (Ind. 1993).

258. *Id.* at 248.

259. *Id.* at 251.

a childhood injury occurred as a result of a parent's tortious conduct.²⁶⁰ *Fager* opens up the possibility for many more actions by children against their parents.

Finally, in *Penix v. Hicks*,²⁶¹ the court of appeals held that the wife's money judgment set out in the divorce decree was a judgment lien under section 34-1-45-2 of the Indiana Code,²⁶² finding that the divorce decree did not limit the application of the judgment lien statute as it could pursuant to section 31-1-11.5-15 of the Indiana Code. *Penix* affirms the true "judgment" nature of divorce decrees but also illustrates the authority possessed by trial courts to excise that judgment from the public record.

VI. CONCLUSION

The year 1993 saw many notable refinements to Indiana family law. When judged against the expectations preceding the advent of this year, the progression may seem less than startling. When viewed in the context of the historical priority traditionally shown family law matters in Indiana, however, the developments reflect the increased thought given to family law issues by the Indiana General Assembly and Indiana appellate courts. This continued attention bodes well for the future of Indiana family law and Indiana citizens.

260. *Id.* See also *Barnes v. Barnes*, 603 N.E.2d 1337 (Ind. 1992).

261. 618 N.E.2d 1346 (Ind. Ct. App. 1993).

262. IND. CODE § 34-1-45-2 (Burns 1986).

CHANGES IN HEALTH CARE LAW IN 1993 BRING NEW CHALLENGES FOR PROVIDERS

ROLANDA MOORE HAYCOX*

*In chaos, there is opportunity.*¹

INTRODUCTION

While Congress is debating the merits of the American Health Security Act of 1993, the health care system in Indiana is already in a state of flux. This year, changes have occurred in medical malpractice law and in the rules promulgated by the Indiana State Department of Health and the Office of the Secretary of Family and Social Services. These changes, in conjunction with changes in federal Medicare and Medicaid law, are influencing providers to form health care networks and other alliances to help them survive the changes that may result from health reform. Indiana health care providers and lawmakers are not waiting for national health reform: they have decided that the time for change has arrived.

This Article will set forth a description of as many of the recent cases and regulatory changes affecting health care practitioners as possible.² The Article will first survey the cases involving the Indiana medical malpractice statute. It will then provide a discussion of cases involving the state's Medicaid program, changes in the law affecting the limitation of health insurance benefits for individuals with acquired immune deficiency syndrome (AIDS), and cases involving peer review and physician relationships. Finally, the Article will discuss some important changes in federal health care law, including the anti-referral provisions of the Omnibus Budget Reconciliation Act of 1993 (OBRA 1993), the proposed safe harbors under the Medicare-Medicaid Anti-Kickback Statute, and cases decided under the Emergency Medical Treatment and Labor Act.

* Associate, Baker & Daniels, Indianapolis. B.S.N., 1986, Indiana University School of Nursing; M.H.A., 1992, Indiana University School of Public & Environmental Affairs; J.D., 1992, Indiana University School of Law—Indianapolis. The author would like to thank Gina Hicklin for her assistance in preparing this Article for publication.

1. Chinese proverb.

2. Specifically, the Article covers the time period from January 1, 1993 to December 30, 1993.

I. MEDICAL MALPRACTICE

Several opinions involving the Indiana Medical Malpractice Act (Act)³ were issued by the Indiana courts this year. Of particular interest are the opinions utilizing the “new” standard of care articulated by the Indiana Supreme Court in 1992 and describing various actions within the scope of the Act.⁴

A. Proving the Standard of Care

In 1992, the Indiana Supreme Court decided to join the majority of courts nationwide abolishing the modified locality rule.⁵ In *Vergara ex rel. Vergara v. Doan*,⁶ the parents of a newborn child asked the Indiana Supreme Court to consider the abandonment of the modified locality rule in medical malpractice cases in Indiana—a challenge Chief Justice Shepard accepted, describing the new standard as “a relatively modest alteration of existing law.”⁷ The following rule

3. IND. CODE §§ 27-12-1-1 to -18-2 (1993) (previously codified at IND. CODE §§ 16-9.5-1-1 to -10-5). Practitioners unfamiliar with the Indiana Medical Malpractice Act may find helpful background and commentary in Eleanor D. Kinney et al., *Indiana's Medical Malpractice Act: Results of a Three-Year Study*, 24 IND. L. REV. 1275 (1991).

4. Because of space limitations, it is not possible to discuss all of the state cases impacting the practice of medical malpractice law that were issued since the last Survey Issue was printed; therefore, I have chosen only a few cases to highlight. In addition, some cases of interest have been published since the end of the time frame for this Article. Therefore, the reader may also wish to review the following cases: *Hoskins v. Sharp*, 629 N.E.2d 1271 (Ind. Ct. App. 1994) (trial court has jurisdiction to order compliance with the requirements for formation of a medical review panel and defendant's insistence on a properly formal panel does not constitute waiver); *Mayhue v. Sparkman*, 627 N.E.2d 1361 (Ind. Ct. App. Jan. 31, 1994) (adopting the loss of chance doctrine for compensation for the lost chance of recovery); *Weaver v. Robinson*, 627 N.E.2d 442 (Ind. Ct. App. 1993) (holding that “[w]here there is a unanimous medical review panel determination favoring the defendant and no countervailing expert opinion, the defendant is entitled to a judgment as a matter of law” and that the physician's negligence could not be imputed to the hospital because the physician acted as an independent contractor); *Vogler v. Dominguez*, 624 N.E.2d 56 (Ind. Ct. App. 1993) (holding that the plaintiffs failed to provide evidence warranting an inference of negligence and could not rely on the doctrine of *res ipsa loquitur* because they failed to establish standard of care applicable to the hospital's employees); *Mundy v. Angelicchio*, 623 N.E.2d 456 (Ind. Ct. App. 1993); *Jordan v. Deery*, 609 N.E.2d 1104 (Ind. 1993) (holding that the issuance of a medical review panel decision does not shorten the time a plaintiff would otherwise have to file a complaint in state court); *Blackden v. Kaufman*, 611 N.E.2d 663 (Ind. Ct. App. 1993) (holding that the trial court did not err in dismissing the plaintiffs' claim with prejudice for failure to submit evidence or to notify the medical review panel that no evidence will be submitted, causing the panel to fail to render an opinion in 180 days); *McGee v. Bonaventura*, 605 N.E.2d 792 (Ind. Ct. App. 1993) (holding that a certified unanimous opinion of the medical review panel negated the existence of a genuine issue of material fact).

5. A description of the locality rule and the modified locality rule and their abandonment by various courts can be found in John K. Johnson, Jr., Note, *An Evaluation of Change in the Medical Standard of Care*, 23 VAND. L. REV. 729 (1970).

6. 593 N.E.2d 185 (Ind. 1992).

7. *Id.* at 188.

was then articulated as the new standard for medical malpractice cases in Indiana:

[A] physician must exercise that degree of care, skill, and proficiency exercised by reasonably careful, skillful, and prudent practitioners in the same class to which he belongs, acting under the same or similar circumstances. Rather than focusing on different standards for different communities, this standard uses locality as but one of the factors to be considered in determining whether the doctor acted reasonably. Other relevant considerations would include advances in the profession, availability of facilities, and whether the doctor is a specialist or general practitioner.⁸

Justice Givan in a concurring opinion noted, however, that the “new standard” enunciated by the court is not a new standard at all.⁹ Instead, he observed that the new standard does not materially alter the modified locality rule because the facilities available to the physician and the physician’s training as either a generalist or a specialist should be considered.¹⁰ Therefore, he concluded, “the majority has articulated a distinction without a difference. I would not confuse the issue by purporting to do away with the modified locality rule.”¹¹ The commentators agreed.¹²

This year, at least two Indiana cases have recited the *Vergara* standard. In *Widmeyer v. Faulk*,¹³ the Indiana Court of Appeals stated that regardless of the “change” in the test used to determine whether the standard of care has been met, a plaintiff must submit expert medical testimony if the injury alleged is outside the “common knowledge” of a jury.¹⁴ The plaintiff, Teresa Widmeyer, needed to have a tooth extracted that was the back anchor to a three-tooth bridge. The tooth could not be extracted until the bridge was severed. Ms. Widmeyer visited an oral surgeon, Dr. Faulk, who used a low-speed handpiece with a

8. *Id.* at 187.

9. *Id.* at 188 (Givan, J., concurring).

10. *Id.* (Givan, J., concurring).

11. *Id.* at 185 (Givan, J., concurring).

12. In one article a commentator stated that the change in the standard would not have an impact because technological advances have emerged in communication, travel, and education, and the disparity between urban and rural physicians is no longer present. Linda Pence, *New Standard of Care in Medical Malpractice Cases?*, INDPLS. BUS. J., Dec. 14-20, 1992, at 8B. This commentator concluded: “For this reason, the *Vergara* ruling should have virtually no impact in medical malpractice cases. In fact, the court itself described its ruling as ‘a relatively modest alteration of existing law.’ Thus, in the great scheme of things, the status quo has not been disturbed.” *Id.* Similarly, in a later case, the Indiana Supreme Court reemphasized that the standard of care has not changed too drastically when Justice Krahulik described the new standard as a “shortened” definition of the standard of care. *Culbertson v. Mernitz*, 602 N.E.2d 98, 100 (Ind. 1992).

13. 612 N.E.2d 1119 (Ind. Ct. App. 1993).

14. *Id.* at 1123.

separating disc attachment to cut the solder joint of the bridge. In the process, Ms. Widmeyer's tongue was lacerated. Unfortunately for Dr. Faulk, he was not a "qualified health care provider" under the Indiana Medical Malpractice Act, which allowed Ms. Widmeyer to file a complaint in superior court for his alleged medical malpractice in treating her tongue and tooth.¹⁵ The trial court granted summary judgment in Dr. Faulk's favor.

The court of appeals noted that the applicable standard of care is "that degree of care, skill, and proficiency exercised by reasonably careful, skillful, and prudent practitioners in the same class to which he belongs, acting under the same or similar circumstances."¹⁶ The court added that generally the plaintiff must present expert medical testimony to establish that the practitioner's conduct fell below the standard of care, although conduct a jury can understand without technical explanation does not require expert testimony.¹⁷ Ms. Widmeyer's evidence on summary judgment consisted of an affidavit from a general dentist who admitted that he was not competent to testify on the standard of care for an oral surgeon. The court concluded that Ms. Widmeyer did not submit evidence that raised a genuine issue of material fact concerning Dr. Faulk's conduct and that the facts were not within the "common knowledge" of a jury, which would negate the need for the submission of such evidence.¹⁸ The court also rejected Ms. Widmeyer's argument that the doctrine of *res ipsa loquitur* applies because she "failed to introduce expert testimony that her injury is one that ordinarily occurs only in the absence of due care."¹⁹

In another case, the Indiana Court of Appeals again decided against a plaintiff who failed to provide sufficient expert testimony to demonstrate that an allegedly negligent practitioner engaged in conduct that fell below the standard of care. In *Bonnes v. Feldner*,²⁰ the plaintiffs, Ronald and Christine Bonnes, sued a family physician and an internist who performed a treadmill stress test on Ronald Bonnes. Mr. Bonnes, who was experiencing intermittent chest pain, visited Dr. Feldner, his family physician, who referred him to Dr. Lanman for

15. See IND. CODE § 27-12-3-1 (1993) (previously codified at IND. CODE § 16-9.5-1-5).

16. *Widmeyer*, 612 N.E.2d at 1122 (quoting *Vergara*, 593 N.E.2d at 187).

17. *Id.* The exception to the rule that expert testimony is required, which is generally referred to as the "common knowledge" exception, is applicable in cases in which negligence may be inferred from common knowledge or in:

situations in which the complained-of conduct is so obviously substandard that one need not possess medical expertise in order to recognize the breach. It is otherwise when the question involves the delicate inter-relationship between a particular medical procedure and the causative effect of that procedure upon a given patient's structure, endurance, biological makeup, and pathology. The sophisticated subtleties of the latter question are not susceptible to resolution by resort to mere common knowledge.

Malooley v. McIntyre, 597 N.E.2d 314, 319 (Ind. Ct. App. 1992).

18. *Widmeyer*, 612 N.E.2d at 1123.

19. *Id.* at 1124. *Cf.* *Wright v. Carter*, 622 N.E.2d 170 (Ind. 1993) (affirming summary judgment for radiologist because the plaintiff failed to produce expert medical testimony).

20. 622 N.E.2d 197 (Ind. Ct. App. 1993).

a cardiac stress test. Mr. Bonnes experienced chest pain during the procedure, but his blood pressure, pulse, and electrocardiogram (EKG) did not show any abnormalities.

Eight months later, Mr. Bonnes experienced chest and jaw pain, shortness of breath, and numbness and swelling of his left hand. He was diagnosed with angina. Mr. Bonnes later sought the advice of yet another physician, a cardiologist, who performed a coronary angiogram, attempted to perform an angioplasty, and referred Mr. Bonnes for open heart surgery. Mr. Bonnes later sued Drs. Feldner and Lanman.

After the decision of a medical review panel was issued, Mr. Bonnes proceeded to court and a jury trial was held. At the close of the plaintiffs' case, Dr. Feldner was granted judgment on the evidence.²¹ On appeal, the court noted that the appropriate standard of care is

that degree of care, skill, and proficiency exercised by reasonably careful, skillful, and prudent practitioners in the same class to which he belongs, acting under the same or similar circumstances. Locality, advances in the profession, availability of facilities, and whether the doctor is a specialist or general practitioner are factors to be considered [sic] in determining whether the doctor acted reasonably.²²

The court reasoned that because Dr. Feldner is a family physician, expert testimony was required of what other similarly situated family physicians would have done under the circumstances.²³

The plaintiffs introduced the expert testimony of a cardiologist practicing in the south Chicago-northwest Indiana area. The expert testified with regard to how he would treat Mr. Bonnes's case as a cardiologist, not how the case would be treated by a similarly situated family physician acting under similar circumstances.²⁴ In fact, the expert testified that he was "not totally passing judgment on a GP [general practitioner] or family practitioner in that their mind set is somewhat different, and it becomes very difficult to put myself in their shoes."²⁵ The court affirmed the trial court's grant of judgment on the evidence because the plaintiffs failed to produce expert testimony on the appropriate standard of care.²⁶

21. Dr. Lanman received a favorable verdict, which was not the subject of this appeal.

22. *Bonnes*, 622 N.E.2d at 199 (quoting *Vergara*, 593 N.E.2d at 187) (citation omitted).

23. *Id.*

24. *Id.* at 200.

25. *Id.*

26. *Id.* at 201. The court also noted that the submission of an uncertified copy of the medical review panel's opinion cannot be considered as evidence in determining whether a *prima facie* case of medical malpractice has been made. *Id.*

B. Actions Within the Scope of the Act

1. *The Good Samaritan Law*.—Indiana law provides protection for individuals who render emergency care at the scene of an accident. This statute, known as the Good Samaritan Law, states:

Any person, who in good faith gratuitously renders emergency care at the scene of an accident or emergency care to the victim thereof, shall not be liable for any civil damages for any personal injury as a result of any act or omission by such person in rendering the emergency care or as a result of any act or failure to act to provide or arrange for further medical treatment or care for the injured person, except acts or omissions amounting to gross negligence or wilful or wanton misconduct.²⁷

This year, the Indiana courts were asked on two occasions to address arguments that a practitioner's conduct was within the scope of the Good Samaritan Law and therefore, was outside the scope of the Medical Malpractice Act.

First, in *Beckerman v. Gordon*,²⁸ a physician appealed the denial of his summary judgment motion on the grounds that the court improperly applied and misconstrued the Indiana Good Samaritan Law. The original action was filed by the administrator of the estate of Mary Ann Gordon. Mrs. Gordon experienced chest pain that radiated down her left arm early one morning. Her husband called Dr. Beckerman, who made a house call, diagnosed Mrs. Gordon with "pleurisy," and gave her medication for pain and nausea. Mrs. Gordon's condition did not improve, and within an hour, she was in full cardiac arrest. Mrs. Gordon was transferred by ambulance to the nearest hospital, but she never regained consciousness and died. Mr. Gordon, as the administrator of his wife's estate, sued Dr. Beckerman after an autopsy showed that Mrs. Gordon died of a coronary artery blockage.

Dr. Beckerman claimed that he was protected from liability under the Good Samaritan Law and that the applicable standard of care was whether his conduct constituted gross negligence or wilful or wanton misconduct. When these arguments were made to the medical review panel, Dr. Beckerman was ordered to delete them from his submission. An interlocutory appeal from the panel's order was denied. After the medical review panel found his conduct to be negligent and the matter was brought before a trial court, Dr. Beckerman again made arguments that his conduct fell within the scope of the Good Samaritan Law. The trial court sustained the estate's motion to strike Dr. Beckerman's Good Samaritan Law defense.

27. IND. CODE § 34-4-12-1 (1993).

28. 614 N.E.2d 610, *reh'g denied*, 618 N.E.2d 56 (Ind. Ct. App. 1993).

On appeal, the court noted that every state has enacted a Good Samaritan Law.²⁹ The court reasoned, however, that the Indiana Good Samaritan Law differs substantially from those enacted in other states because, by its clear language, it is not applicable to *all* emergencies.³⁰ Furthermore, a previous version of the statute stated that it was applicable to emergency care rendered “at the scene of an accident, *casualty, or disaster* to a person injured therein. . . .”³¹ The court then struggled with the definitions of the terms “accident” and “emergency” and concluded:

The legislature has not provided a definition of the term “accident” as it is used in the Good Samaritan Law. While the term has been defined in many ways in various contexts by numerous courts, we can, at least, agree with the observation that “[a]ccident” is a word of varied meaning and of no fixed legal signification.”

Generally, an “accident” can be defined as a sudden, unexpected event. An “emergency” can be described as an unexpected condition or set of circumstances requiring immediate attention.

We perceive that the distinction between an “accident” and an “emergency” is that an accident is a single discrete *event* causing unexpected consequences, while an emergency is a *condition* that has unexpectedly arisen. An “emergency” can be thought of as the effect of an “accident,” but not all emergencies are the result of accidents, as the condition could develop from a gradual series of events, and all accidents do not necessarily create emergencies. The term “emergency” has a broader scope than the word “accident” and the terms are not synonymous. Therefore, as used in the Good Samaritan Law, we conclude the legislature intended “accident” to mean a type of sudden calamitous event, and not all situations that might require immediate action.³²

Therefore, the court concluded that the motion to strike the Good Samaritan Law defense was not in error because Dr. Beckerman did not render care at the scene of an accident.³³

Judge Sullivan dissented, claiming that Dr. Beckerman should have been allowed to present the Good Samaritan Law defense to the trier of fact.³⁴ Judge Sullivan’s disagreement with the majority opinion stemmed from his interpretation of the terms “accident” and “emergency.” In his opinion, he stated:

29. *Id.* at 612.

30. *Id.* at 612-13.

31. *Id.* at 613 (quoting 1963 Ind. Acts c. 319 § 1) (emphasis added).

32. *Id.* (citations omitted).

33. *Id.* at 613.

34. *Id.* at 614 (Sullivan, J., dissenting).

Were it not for definitions of "accident" contained in numerous Indiana case decisions, I might find the majority's analysis of the legislative history of our statute more persuasive. By deleting "casualty or disaster" from the statute, it might appear . . . that the General Assembly did not intend that every rendering of emergency care should cloak the actor with the protection of the Good Samaritan defense. . . .

The word "emergency" describes the nature of the care administered in the particular situation, while "accident" describes the occurrence which brings about the necessity for that care. In order for the Good Samaritan defense to be available, the care must be of an emergency nature and in addition, that care must be required or indicated as a result of an "accident." An "accident," in its normal and common connotation, may be deemed to be "any mishap or untoward event not expected or designed."³⁵

Judge Sullivan posited that the unexpectedness of the event must be considered from the point of view of the victim, not the point of view of the "reasonable man," which would be appropriate in insurance coverage and workers' compensation claims.³⁶ He reasoned that Dr. Beckerman was responding to "a cry for help," which was not distinguishable from a cry for help from a golfer on a golf course or a victim of a terrorist's acts.³⁷ Therefore, he would have allowed Dr. Beckerman to assert his defense in light of the factual issues raised by his interpretation of the statute.

The second case interpreting the applicability of the Good Samaritan Law in medical malpractice claims is *Steffey v. King*.³⁸ *Steffey* involved the appeal of a trial court's decision that the Good Samaritan Law was applicable to provide a physician with immunity for her actions in assisting with the birth of a child. Mildred Steffey was admitted to Community Hospital of Indianapolis for the delivery of her child. Her physician, Dr. King, decided to allow Mrs. Steffey to deliver the child through a normal vaginal delivery. Although Dr. King was present during Mrs. Steffey's early labor, he could not be found when she was ready to deliver. A nurse found another physician, Dr. Templeton, to assist with the delivery, but by the time she arrived, Mrs. Steffey's husband was already holding the baby's legs. Dr. Templeton used forceps to deliver the baby, who was cyanotic and had indentations on his head.

After submissions were made to the medical review panel, Dr. Templeton petitioned for a preliminary determination of law to determine the applicability of the Good Samaritan law and moved for summary judgment, which was

35. *Id.* (Sullivan, J., dissenting) (citations omitted).

36. *Id.* (Sullivan, J., dissenting).

37. *Id.* at 615 (Sullivan, J., dissenting).

38. 614 N.E.2d 615, *reh'g denied*, 618 N.E.2d 56 (Ind. Ct. App. 1993).

granted in her favor.³⁹ On appeal, the court cited its decision in *Beckerman* and held that the trial court erred in granting summary judgment to Dr. Templeton.⁴⁰ The court reasoned:

In *Beckerman*, we strictly construed the Good Samaritan Law and concluded that the legislature did not intend for the Law to apply to all emergencies. Contrasting Indiana's statute with the laws of other states, we determined that the language employed in Indiana's version of the Good Samaritan Law was narrowly drafted to protect only those individuals who render emergency care at the scene of an accident or to the victims of such an accident. We decided that, as used in the Good Samaritan Law, "accident" was not synonymous with "emergency" and that the legislature intended "accident" to mean a type of sudden calamitous event, and not all situations that might require immediate attention.⁴¹

Judge Sullivan reaffirmed his analysis in *Beckerman*, but concurred with the majority's opinion.⁴² He concluded that, from the perspective of the mother and the child, the delivery was not an "accident," but was instead, an expected event.⁴³

On rehearing of both the *Beckerman* and *Steffey* cases, Drs. Beckerman and Templeton argued that prohibiting the use of the Good Samaritan Law defense will discourage physicians from responding to emergency situations. The court disagreed and added the following observation:

We cannot agree that our interpretation of the Good Samaritan Law will have such a "chilling" effect on doctors. The conclusion that a doctor is not entitled to immunity under the Good Samaritan Law is not the equivalent of a determination that the doctor acted negligently. The sudden emergency doctrine operates to modify the standard of care expected of individuals who are forced to respond to an emergency not of their own making. The fact that a doctor may have been responding to an emergency is therefore a factor to be considered in a medical malpractice action. Since the sudden emergency doctrine already provides physicians with a relaxed standard of care, we do not believe our strict construction of the Good Samaritan Law would seriously inhibit a doctor's decision to provide emergency medical assistance.⁴⁴

39. See IND. CODE § 27-12-11-1 (1993) (previously codified at IND. CODE § 16-9.5-10-1).

40. *Steffey*, 614 N.E.2d at 617.

41. *Id.*

42. *Id.* (Sullivan, J., concurring).

43. *Id.* (Sullivan, J., concurring).

44. *Beckerman*, 618 N.E.2d at 57 (citations omitted).

The court reasoned further that its decision is consistent with the reasonable expectation of patients.

Finally, Drs. Beckerman's and Templeton's arguments ignore the reasonable expectations of their patients. It cannot reasonably be concluded that a woman hospitalized for the birth of a child would consider that the standard of care of those attending her would depend upon whether or not they were on call or present at the hospital attending other patients when she was treated. If the Gordons had known that Dr. Beckerman would not be held to the established standard of care, they might well have elected to call an ambulance . . . instead of relying on his assistance.⁴⁵

Based on these reasons, the court denied the physicians' request for a rehearing.⁴⁶

2. *Ordinary Negligence.*—This year, the Indiana courts revisited the issue of when a health care provider's actions constitute ordinary negligence, rather than medical malpractice. In *Putnam County Hospital v. Sells*,⁴⁷ the Indiana Court of Appeals held that a patient's claim for injuries sustained when she fell from a recovery room bed was a claim for medical malpractice, not a claim for ordinary negligence.⁴⁸ Consequently, because the plaintiff failed to submit the claim to the Department of Insurance for review by a medical malpractice panel, the trial court did not have subject matter jurisdiction to hear her claim.⁴⁹

In determining that the patient stated a claim for medical malpractice, the court distinguished previous cases in which a health care provider's negligent conduct was nonmedical in nature and was found to be ordinary negligence, rather than medical malpractice. The court first discussed the case of *Winona Memorial Foundation of Indianapolis v. Lomax*.⁵⁰ In *Lomax*, a patient brought a claim for damages after she tripped on a loose floorboard. The *Lomax* court held that a claim based on premises liability, such as Ms. Lomax's claim, does

45. *Id.* at 57-58.

46. *Id.* at 58.

47. 619 N.E.2d 968 (Ind. Ct. App. 1993).

48. *Id.* at 972. The plaintiff's complaint stated:

5. That following surgery on January 8, 1991, Leann Sells was taken to the recovery room where she fell off of a table while under anesthesia sustaining injury to her face.

6. That the defendant, Putnam County Hospital, was negligent in failing to properly train and supervise its staff members with regard to proper procedure for monitoring patients in the recovery room following surgery.

7. That the Defendants were negligent in failing to properly monitor and observe Leann Sells in the recovery room, failing to insure that railings were in place on her recovery room bed and failing to take proper steps to insure that Leann Sells would not injury herself while under anesthesia.

Id. at 971.

49. *Id.* at 972.

50. 465 N.E.2d 731 (Ind. Ct. App. 1984).

not fall within the scope of the Medical Malpractice Act.⁵¹ The court then turned to the case of *Harts v. Caylor-Nickel Hospital, Inc.*,⁵² in which a patient brought a claim for injuries sustained when he fell from his hospital bed. The *Harts* court reasoned that the plaintiff's allegations were not "part and parcel of diagnosis and treatment which would subject his claim to coverage under the Act"⁵³ and held that the claim did not fall within the scope of the Act.⁵⁴

In distinguishing the *Lomax* and *Harts* decisions, the *Putnam County* court discussed the case of *Methodist Hospital of Indiana, Inc. v. Rioux*,⁵⁵ which allowed a plaintiff to bring a claim for medical malpractice after she fell and broke her hip while she was a patient at Methodist Hospital. The court noted that, in the *Rioux* case, the plaintiff's complaint alleged that the hospital "negligently and carelessly failed to provide appropriate care . . . to prevent [her] fall and injury."⁵⁶ However, in the *Lomax* case, the plaintiff's complaint stated that Ms. Lomax "fell as a proximate result of defendant's negligent maintenance of the floor . . . in allowing a broken board to stick up in said floor,"⁵⁷ and in the *Harts* case, the plaintiff's complaint stated, "The direct and proximate cause of the fall of Plaintiff was the negligence of the Defendants."⁵⁸ The *Putnam County Hospital* court concluded that Ms. Sell's claim was more like the claim in *Rioux* than the claims in *Lomax* or *Harts*; therefore, her complaint alleged "that the Hospital's acts or omissions fell below the appropriate standard of care" and was therefore a claim for medical malpractice.⁵⁹

3. *Sexual Conduct.*—The Indiana courts have also concluded that protection under the Act may be extended to a health care provider who has a sexual relationship with a patient. This determination, originally articulated in *Collins v. Covenant Mutual Insurance Co.*,⁶⁰ was reinforced this year when the Indiana Court of Appeals decided the case of *Dillon v. Callaway*.⁶¹

Linda Callaway was treated by Dr. Richard Chambers for multiple joint pain. Dr. Chambers suspected that the source of Ms. Callaway's pain was psychological in nature and began therapy sessions with her. During the next four years, Dr. Chambers and Ms. Callaway engaged in "bizarre and perverted

51. *Id.* at 742.

52. 553 N.E.2d 874 (Ind. Ct. App. 1990).

53. *Id.* at 879.

54. *Id.*

55. 438 N.E.2d 315 (Ind. Ct. App. 1982).

56. *Putnam County Hosp.*, 619 N.E.2d at 971 & n.2 (quoting *Rioux*, 438 N.E.2d at 316).

57. *Lomax*, 465 N.E.2d at 742.

58. *Harts*, 553 N.E.2d at 879. Mr. Harts also filed an affidavit that stated, "I am not pursuing a claim for medical negligence arising out of this fall." *Id.*

59. *Putnam County Hosp.*, 619 N.E.2d at 971 & n.2.

60. 604 N.E.2d 1190 (Ind. Ct. App. 1992).

61. 609 N.E.2d 424 (Ind. Ct. App. 1993).

sexual conduct.”⁶² Ms. Callaway was later hospitalized with major depressive symptoms, including severe depression with suicidal thoughts, anorexia, and agoraphobia. She subsequently settled a claim against Dr. Chambers for an amount with a present value of more than \$75,000 and petitioned the Patient Compensation Fund (Fund) for additional damages.

The Indiana Court of Appeals held that Ms. Callaway’s injuries were within the scope of the Indiana Medical Malpractice Act and that she could receive damages from the Fund.⁶³ In making this decision, the court distinguished the case of *Dillon v. Glover*,⁶⁴ in which the Indiana Supreme Court held that once a plaintiff settles a medical malpractice claim, proximate cause is no longer an issue.⁶⁵

The *Glover* court looked at the relevant statute, which provides that after a medical malpractice claim is settled, a claimant may petition the court to recover additional damages from the Fund.⁶⁶ In reviewing this statute and drawing its conclusion, the court stated:

Obviously we cannot support the Fund’s view that the Statute allows the Fund to litigate a health care provider’s liability after the provider’s liability on a claim is settled. In our view the Statute contemplates that, upon a petition for excess damages, the trial court will determine the *amount* of damages, if any, due to the claimant, not *whether* the provider is liable for damages.⁶⁷

In contrast, the *Callaway* court found that, unlike the issue of proximate cause, the issue of the compensable nature of a plaintiff’s claim is not foreclosed merely because the parties have entered a settlement agreement.⁶⁸

The court then noted that a “significant exception” is applicable to “the generally developed rule that a typical physician’s sexual relationship with a patient [does] not constitute the rendition of health care services. . . .”⁶⁹ This exception applies when the physician mishandles the “transference phenomenon” during the therapy sessions.⁷⁰

This phenomenon is “[t]he process whereby the patient displaces on to the therapist feelings, attitudes and attributes which properly belong to a significant attachment figure of the past, usually a parent, and responds to the therapist accordingly. . . . Transference is common in

62. *Id.* at 425.

63. *Id.* at 426.

64. 597 N.E.2d 971 (Ind. Ct. App. 1992).

65. *Id.* at 973.

66. See IND. CODE § 27-12-15-3 (1993) (previously codified at IND. CODE § 16-9.5-4-3(1)).

67. *Dillon*, 597 N.E.2d at 973 (footnote omitted).

68. *Callaway*, 609 N.E.2d at 426.

69. *Id.*

70. *Id.* at 428.

psychotherapy. The patient, required to reveal her innermost feelings and thoughts to the therapist, develops an intense, intimate relationship with her therapist and often 'falls in love' with him. The therapist must reject the patient's erotic overtures and explain to the patient the true origin of her feelings. A further phenomenon that may occur is countertransference, when the therapist transfers his own problems to the patient. When a therapist finds that he is becoming personally involved with the patient, he must discontinue treatment and refer the patient to another therapist."⁷¹

Because Dr. Chambers took advantage of Ms. Callaway's emotional status and history of sexual abuse as a result of mishandling the transference phenomenon, the court concluded that Ms. Callaway's injuries resulted from the rendition of health care and were within the purview of the Act.⁷²

C. Summary of 1993 Medical Malpractice Cases

In deciding cases involving the scope of the Indiana Medical Malpractice Act, the Indiana courts continue to articulate a standard of care that, although not specifically stated in terms of locality, considers locality as a factor in determining whether the physician acted reasonably. The courts will also consider whether the physician is a generalist or a specialist. The courts are reluctant to stray from this standard through the application of the common knowledge exception or the doctrine of *res ipsa loquitur*. Therefore, a plaintiff should be prepared to present expert testimony to demonstrate that the health care provider failed to meet the standard of care.

In determining the scope of the Act, the courts have been unable to define lines that provide much comfort for providers. Although by becoming a qualified provider under the Act a health care provider may take advantage of the statutory cap on damages, the cap will not apply to acts the courts have determined are outside the scope of the Act. This year, the Indiana courts made clear that when a health care provider responds to a patient's immediate medical needs, the provider is not entitled to protection under the Indiana Good Samaritan Law when the response is to an "emergency," rather than an "accident."

Whether a health care provider receives protection under the Act may also be governed by the skill used by the plaintiff's counsel. Nonmedical acts by a health care provider are not within the scope of the Act when it is alleged that the nonmedical act is the proximate cause of the plaintiff's injury. On the other hand, a provider's nonmedical acts may fall within the purview of the Act if it is alleged that they caused the provider to fall below the standard of care.

71. *Id.* at 427 (quoting *St. Paul Fire & Marine Ins. Co. v. Love*, 459 N.W.2d 698, 700 (Minn. 1990) (citation omitted)).

72. *Id.* at 428.

Finally, a physician's sexual conduct generally does not fall within the Act's protections. This general rule may be disregarded if the physician reacted inappropriately to a patient's response to psychotherapy.

II. MEDICAID

In 1993, the Indiana courts were once again faced with the issues of whether the Indiana Medicaid statute includes a resource spend-down requirement and whether the reimbursement mechanism used for nursing facilities meets the requirements of the Boren Amendment.

A. Medicaid Eligibility

This year the Indiana Supreme Court affirmed the opinion of the Indiana Court of Appeals in *Indiana Department of Public Welfare v. Payne*.⁷³ Hazen Payne was a construction laborer who developed leukemia and was hospitalized at the Indiana University Medical Center for five months, resulting in medical bills of approximately \$150,000. Payne applied for Medicaid benefits to cover these expenses, but was denied eligibility for the period for which he was hospitalized because he owned resources in excess of the financial requirements used by the Department of Public Welfare (Department).⁷⁴

The trial court reversed the Department's decision and the court of appeals affirmed.⁷⁵ The decision of the court of appeals was based on the status of Indiana's Medicaid program as a "section 209(B)" program. Section 209(b) of the federal Medicaid statute allows state legislatures to elect to provide Medicaid benefits only to persons who would have been eligible under the state's Medicaid plan as it existed on January 1, 1972.⁷⁶

When Payne applied for benefits, the Department used its resource limitation requirement to determine his eligibility for benefits.⁷⁷ The court rejected the

73. 592 N.E.2d 714 (Ind. Ct. App. 1992), *aff'd*, 622 N.E.2d 461 (Ind. 1993). See Rolanda Moore Haycox, 1992: *A Year of Change for Our Health Care System*, 26 IND. L. REV. 1003, 1005-1007 (1993).

74. Although the cases described refer to the Department of Public Welfare, the state Medicaid program is now administered by the Office of Medicaid Policy and Planning. IND. CODE §§ 12-8-6-1, 12-15-1-1 (1993).

75. *Payne*, 592 N.E.2d at 726.

76. 42 U.S.C.A. § 1396a(f) (Supp. 1993); 42 C.F.R. § 435.121 (1992). On rehearing, the court stated that section 209(b) requires a state to provide Medicaid benefits to persons who would be eligible under the criteria as they existed on January 1, 1972, and these criteria apply even if they are more liberal than the criteria used in Supplemental Security Income (SSI) states. *Payne*, 598 N.E.2d 608, 610 (Ind. Ct. App. 1992).

77. An applicant or recipient is ineligible for medical assistance for any month in which the total equity value of all non-exempt resources exceeds the applicable limitation, set forth below, on the first day of the month:

(1) \$1,500 for the applicant or recipient, including the amount determined in (b) below, if applicable; or

Department's argument that its regulation is based on a statute providing for the resource limitations for Medicaid eligibility because the statute concerns only money, stocks, bonds, and life insurance.⁷⁸ The court also emphasized that the statute does not prohibit a resource spend-down, and that such a spend-down would be consistent with its principles because the applicant's resources would still have to meet the \$1,500 limitation as evaluated on the first day of the month.⁷⁹

Furthermore, the court determined that the state's plan on January 1, 1972⁸⁰ and the Department's Medicaid Manual in effect until 1984 also allowed a resource spend-down.⁸¹ The court concluded that because the Department may not use more restrictive criteria than those in place on January 1, 1972, it was required to allow Payne to spend down his income to attain eligibility for the state Medicaid program.⁸²

After the Indiana Court of Appeals made its decision in the *Payne* case, the Seventh Circuit issued its opinion in *Roloff v. Sullivan*.⁸³ The apparent conflict between *Roloff* and *Payne* has created some confusion in the applicability of the resource spend-down rules articulated in *Payne*.⁸⁴

(2) \$2,250 for the applicant or recipient and his spouse.

Payne, 592 N.E.2d at 720 (quoting IND. ADMIN. CODE tit. 470, r. 9.1-3-17(a) (1988)).

78. *Id.* at 721. At the time of this case, the statute read:

An applicant for, or recipient of, medical assistance, is ineligible for that assistance if the total cash value of money, stocks, bonds, and life insurance owned by:

(1) the applicant or recipient exceeds fifteen hundred dollars (\$1,500), in the case of medical assistance to the aged, blind, or disabled.

(2) the applicant, or recipient, and his spouse exceeds two thousand two hundred fifty dollars (\$2,250), in the case of medical assistance to the aged, blind, or disabled.

Id. (quoting IND. CODE § 12-1-7-18.5(a) (1988)).

79. *Id.*

80. (c) Possession of intangible personal property with an available liquid cash value in excess of the standard resource allowance shall render an applicant ineligible for assistance, and *utilization of some of the resources down to the amount of the standard resource allowance is necessary before the applicant can be found eligible.*

(d) Possession of intangible personal property with an available cash value which has increased to be in excess of the standard resource allowance shall not make a recipient ineligible for assistance providing the recipient is willing to make the necessary adjustments and has taken immediate steps to do so.

Id. at 722 (quoting Ind. State Dep't of Public Welfare, r. 2-114).

81. *Id.* (citing IND. ADMIN. CODE tit. 470, r. 9-3-2(22.2), 9-4-3(12) (1979)).

82. *Id.* at 724.

83. 975 F.2d 333 (7th Cir. 1992).

84. The decision of the District Court for the Northern District of Indiana in *Roloff* was rejected by the *Payne* court.

In *Roloff*, it was determined that the Department was not required to allow Medicaid applicants to spend down their excess resources to become eligible for benefits. The

The *Roloff* case was brought by a class of persons who applied for eligibility under the Indiana Medicaid program, but were denied benefits because of the Department's "first day of the month" rule. The plaintiffs argued that the first day of the month rule is more restrictive than the Medicaid rules in effect on January 1, 1972 and therefore violated section 209(b) of the federal Medicaid statute.

The *Roloff* court interpreted section 209(b) "as an exception to the otherwise applicable rule that a state must provide Medicaid assistance to the categorically needy" or those entitled to social security income (SSI) benefits.⁸⁵ The court found that the plaintiffs were not entitled to benefits because they did not show they were entitled to receive SSI benefits for the months in which they were denied Medicaid benefits.⁸⁶ The court then stated:

Our resolution of the Section 209(b) issue therefore prevents us from giving blanket approval to Indiana's first day of the month regulation. Since the district court certified a class challenge to the first day of the month rule, the prudent course is to narrow the class definition to include only those similar to the named plaintiffs—namely, those persons denied Medicaid benefits because of the first day of the month rule *who also did not qualify for SSI benefits*.⁸⁷

The court also found that section 1396a(a)(17), which requires the use of reasonable standards for determining eligibility, does not require the State of Indiana to adopt a resource spend-down rule for its Medicaid program.⁸⁸ In making this determination, the *Roloff* court noted that the first day of the month rule was upheld in *Payne*.⁸⁹ Therefore, the court reasoned, a resource spend-down is permitted, but not required.⁹⁰

determination was based on the following conclusion:

"[I]t does not matter whether Indiana had a first day of the month rule as of January 1, 1972, because under the § 209(b) option, a state could either retain eligibility criteria as restrictive as that in 1972 *or* adopt federal SSI standards. Since the first day or [sic] the month rule is an SSI standard, 20 C.F.R. § 416.1207(a), Indiana's option for that standard need not be measured against the state's procedures in 1972."

....

We cannot agree with the conclusion in *Roloff* that a resource spend-down cannot be used in conjunction with a first-day-of-the-month rule.

Payne, 592 N.E.2d at 723.

85. *Roloff*, 975 F.2d at 340.

86. *Id.* at 341.

87. *Id.*

88. *Id.* at 342.

89. *Id.* at 338.

90. *Id.* at 342.

Within ten days of the *Roloff* decision, the Indiana Court of Appeals held in *Indiana Department of Public Welfare v. Teckenbrock*,⁹¹ that the Department must permit an applicant who otherwise qualifies for SSI benefits to spend-down his or her excess resources.⁹² The Teckenbrocks brought this action after they were denied Medicaid benefits because their resources exceeded the \$2,250 limit for married couples.⁹³ They contended that because they met the SSI eligibility requirements and the Indiana Medicaid requirements effective on January 1, 1972, they could not be denied Medicaid benefits.

The Department contended that the Seventh Circuit's decision in *Roloff* was controlling. The court rejected the Department's argument because no claim was made that the Teckenbrocks were ineligible for Medicaid benefits because they did not qualify for SSI benefits.⁹⁴ The court reasoned that the Teckenbrock's case fell within the undecided issue in *Roloff* involving the class of persons who would be eligible for both SSI benefits and for Medicaid benefits under the rules effective on January 1, 1972.⁹⁵ The court then reaffirmed the holding in *Payne*⁹⁶ and found that "the 1972 medical assistance plan requires the [Department] to permit an applicant otherwise in need of medical assistance to become eligible immediately by spending down excess resources."⁹⁷

One month after the *Teckenbrock* case was decided, the Indiana Supreme Court endorsed the holding in *Roloff*.⁹⁸ On appeal of the *Payne* decision, the Department argued that Hazen Payne did not liquidate his resources and did not make payment on his medical expenses by the first day of the months in issue and was therefore ineligible for Medicaid benefits for those months. The Department also argued that the Seventh Circuit's decision in *Roloff* provided

91. 620 N.E.2d 740 (Ind. Ct. App. 1993).

92. *Id.* at 743.

93. The Teckenbrocks owed nursing home bills of over \$16,200, and owned life insurance policies with cash surrender values of \$2,573.70 and a checking account with a balance of \$1.08.

94. *Teckenbrock*, 620 N.E.2d at 741.

95. Inasmuch as the *Roloff* court expressly left "for another day" a decision affecting the class of persons who would be eligible for both SSI benefits under current federal standards and for Medicaid benefits under the rules in force in Indiana at the beginning of 1972, but to whom Indiana had denied Medicaid eligibility, the class into which the Teckenbrocks claim they fall, the *Roloff* court had no cause to consider whether Indiana employed a resource spend-down in 1972 as part of its medical assistance plan, as this court held in *Payne*, or the manner in which the system operated. And, this court likewise has no reason to reject the *Roloff* court's construction of § 209(b). The facts of this case simply do not put *Roloff* and *Payne* in conflict with one another, and the matter can be resolved simply by applying our decision in *Payne*.

Id. at 741-42.

96. *Id.* at 742.

97. *Id.* at 743.

98. *Indiana Dep't of Pub. Welfare v. Payne*, 622 N.E.2d 461 (Ind. 1993).

authority for the proposition that the section 209(b) exemption is only applicable when an applicant meets both the current SSI requirements and the Medicaid requirements effective on January 1, 1972.

The court agreed. In deciding to accept the rule articulated in *Roloff*, the Indiana Supreme Court stated:

We endorse the Seventh Circuit's conclusion in *Roloff* that SSI eligibility is a threshold requirement to participation in Indiana's Medicaid program. In Section 209(b) states such as Indiana, after an applicant has met this threshold eligibility requirement, the inquiry then focuses upon whether the applicant would have been entitled to benefits under Medicaid regulations existent on January 1, 1972. Thus, once an applicant has demonstrated SSI eligibility, he is then entitled to utilize Indiana's resource spend-down provision to, in turn, meet Indiana's standard resource allowance which is more restrictive than its federal counterpart.

As noted by our Court of Appeals, 42 U.S.C. § 1396a(r)(2) does permit Section 209(b) states to use more liberal methodologies in determining income and resource standards than those used by SSI states in evaluating Medicaid eligibility. Required resource spend-down is one such more liberal methodology which may be employed by Indiana since SSI permits but does not require resource spend-down. However, we conclude that Indiana did not intend to extend Medicaid eligibility to those who would not even qualify for benefits under SSI's more liberal requirements, because it did not endorse the more restrictive eligibility requirements by opting for participation in Medicaid under Section 209(b). Thus, the resource spend-down component of eligibility employed by Indiana in 1972 applies only after SSI eligibility requirements have been met. To hold otherwise would be to ignore the apparent intent manifested by Indiana's choice to participate in Medicaid as a Section 209(b) state.⁹⁹

The court then stated that the court of appeals correctly stated in its opinion before rehearing that, in 1972, Indiana permitted a resource spend-down and that a resource spend-down was potentially available to Payne.¹⁰⁰ The court then concluded that meeting the SSI eligibility requirements is a prerequisite for the application of a resource spend-down rule.¹⁰¹ Therefore, under current law, an applicant may become eligible for Medicaid benefits through the use of a resource spend-down only if the applicant meets the SSI eligibility requirements.

99. *Id.* at 468 (citations omitted).

100. *Id.*

101. *Id.*

B. Boren Amendment

The five-year battle over the validity of the rules used to determine Medicaid reimbursement for nursing facilities has also come to a rest. The Indiana Supreme Court held in October in *Indiana State Board of Public Welfare v. Tioga Pines Living Center, Inc.*,¹⁰² that the rules used by the Indiana Department of Public Welfare to determine the *per diem* rates for the reimbursement of nursing facilities do not violate the Boren Amendment.¹⁰³

The challenge to the Medicaid reimbursement system was brought by a class of 785 Medicaid-certified skilled and intermediate nursing facilities. The nursing facilities claimed that the Department's rules violated the Boren Amendment, which requires state Medicaid programs to provide for "reasonable and adequate" rates to meet the costs of care provided,¹⁰⁴ and that the tests for reasonableness used in determining the rates were not promulgated in accordance with law.¹⁰⁵

The Medicaid *per diem* rates for nursing facilities were based on the recognition of the facility's allowable costs plus an incentive, subject to the limitation that the rates would be established at the lowest of a market area limitation, an incentive payment limitation, a maximum allowable annual rate increase limitation, rates charged to the general public for the same type of service, and the rate requested by the provider.¹⁰⁶ Summary judgment rulings

102. 622 N.E.2d 935 (Ind. 1993), *cert. denied*, 114 S. Ct. 1302 (1994).

103. *Id.* at 944.

104. A State plan for medical assistance must—
(13) provide—

(A) for payment . . . of the hospital services, nursing facility services, and services in an intermediate care facility for the mentally retarded provided under the plan through the use of rates . . . for lower reimbursement rates reflecting the level of care actually received . . . which the State finds . . . are reasonable and adequate to meet the costs which must be incurred by efficiently and economically operated facilities in order to provide care and services in conformity with applicable State and Federal laws, regulations, and quality and safety standards and to assure that individuals eligible for medical assistance have reasonable access . . . to inpatient hospital services of adequate quality

42 U.S.C. § 1396a(a)(13)(A) (1988 & Supp. III 1991).

Indiana law provides a similar requirement:

Payment of nursing facility services under 42 U.S.C. 1396a(a)(13)(A) shall be determined in accordance with a prospective payment rate that is reasonable and adequate to meet the costs that must be incurred by efficiently and economically operated facilities to provide care and services in conformity with state and federal laws, rules, regulations, and quality and safety standards, in accordance with rules adopted by the office.

IND. CODE § 12-15-14-2 (Supp. 1992).

105. *Tioga Pines*, 622 N.E.2d at 938-39.

106. (1) A Market Area Limitation (MAL) shall be effective for all providers covered by 470 IAC 5-4.1. The limitation shall be computed on a state-wide basis . . . using projected data submitted by providers for rate reviews. The MAL is an amount which shall be one hundred forty percent (140%) of the

were obtained by the nursing facilities that prevented the Department from using the tests of reasonableness,¹⁰⁷ including the Gross National Product implicit price deflator (GNP/ipd) used in the maximum annual rate increase limiter, and from making line item comparisons without accounting for the facility's size. The Indiana Supreme Court accepted transfer of the consolidated appeal.

The trial court found the rules implementing the tests of reasonableness were not legally promulgated because two members of the State Board of Public Welfare voted by proxy. The supreme court found, however, that the use of the proxies was not harmful error, especially in light of the fact that the nursing facilities waited at least five years from the time of their promulgation before bringing suit.¹⁰⁸

average allowable cost, weighted by certified beds, for the same type of providers.

The average allowable cost for each type of provider shall be maintained by the department and a revision shall be made to this rate limitation four (4) times per year effective on March 1, June 1, September 1, and December 1. Providers whose allowable costs are less than the MAL for their type of service may retain a percentage of the difference as an incentive factor for efficient operation. . . .

(2) The calculated rate is the sum of the allowed *per diem* costs and the add-on incentive. The add-on incentive is a percentage of the difference between the MAL and allowable *per diem* cost, if allowable *per diem* cost is less than the MAL. The provider shall be paid at the calculated rate if such a rate does not exceed any of the other limitations outlined herein.

(3) The maximum allowable annual rate increase shall not be greater than the average rate of change, expressed as a decimal, of the most recent twelve (12) quarters of the Gross National Product Implicit Price Deflator. The twelve (12) quarters cited above shall end three (3) months prior to the beginning of the calendar quarter in which a rate is established. . . . The maximum rate allowed by the annual rate increase limitation shall be applicable to any rate established during the twelve (12) month period between annual rate reviews. The maximum rate allowed by the annual rate increase limitation shall be equal to the rate in effect immediately prior to the rate effective date of the annual rate review, times the sum of one, plus the maximum allowable annual rate increase applicable at the rate effective date of the annual rate review.

(4) In no instance shall the approved Medicaid rate be higher than the rate paid to that provider by the general public for the same type of service.

(5) Should the rate calculations produce a rate higher than the reimbursement rate requested by the provider, the approved rate shall be the rate requested by the provider.

IND. ADMIN. CODE tit. 470, r. 5-4.1-9(a) (Supp. 1990).

107. In determining reasonableness of costs, the department may compare line items, major cost centers or total costs of similar providers in the state and may request satisfactory documentation from providers whose cost does not appear to be reasonable. Similar providers are those with like level of care and geographic location.

Id. r. 5-4.1-10(d).

108. *Tioga Pines*, 622 N.E.2d at 944.

The trial court also found that the GNP/ipd is unrelated to nursing home care and was impermissibly budget-driven. Although the supreme court found error, it did not provide much support for its determination. The court stated:

There was a percentage annual rate increase limiter atop the Indiana plan before the Boren Amendment. The Boren Amendment standard encourages the State to sharpen its focus upon industry behavior and take steps to encourage more efficient and economical operation within that industry. It encouraged change. The State chose to decrease its longstanding annual rate limiter from 9% to the general rate of inflation, that is between 2.8% and 3.8% during the time applicable here, such limiter to be applied to a cost-driven initial or base rate. The changed plan received federal approval and was applied to the industry for five years before it was challenged in court. . . . [A]nnual increases in Indiana using prior year rates, including the cost-driven initial rate, and consistent with the general rate of inflation, continued to be available. To condemn Indiana's reimbursement system for nursing homes on this basis would be to eviscerate the purpose and intent of Boren and the purpose of Indiana's statute. To do so would merely collapse "the post-Boren language into the pre-Boren reasonable cost standard."¹⁰⁹

The court added that because the use of the GNP/ipd was not improper, there could be no damages, equitable reimbursement, or retroactive monetary award.¹¹⁰ Furthermore, because the class did not prevail on its claim that the use of the GNP/ipd is a violation of section 1983 of the Civil Rights Act, the nursing facilities were not entitled to damages under section 1988.¹¹¹

After this decision, the Office of the Secretary of Family and Social Services issued new proposed rules for the rate-setting criteria for nursing facilities.¹¹² These rules provided that nursing facilities rates are subject to the lowest rate achieved by four limitations: (1) the maximum allowable annual rate increase; (2) rates charged to the general public for the same type of service; (3) the rate requested by the provider; and (4) the allowable per patient day cost.¹¹³ In most other respects the rules were similar to additional rules promulgated but not

109. *Id.* at 945-46.

110. *Id.* at 946.

111. *Id.* at 947.

112. LSA Document No. 93-188 (adding IND. ADMIN. CODE tit. 405, r. 1-14-1 to 1-14-28).

113. *Id.* at 13-14 (adding IND. ADMIN. CODE tit. 405, r. 1-14-9(a)). The new rules also provide that the maximum allowable rate increase is limited by the average rate of change of the most recent four quarters of the HCFA/SNF index, instead of the average of the last twelve quarters of the increase in the GNP/ipd, that the *per diem* rate can be no greater than the allowable per patient day cost, and that line items, cost centers, and total costs will be compared with like levels of care throughout the state.

implemented by the Department.¹¹⁴ They have, however, been withdrawn and new proposed rules have not yet been published.¹¹⁵

C. *Altering the Method of Medicaid Reimbursement*

During the last year, the Office of Medicaid Policy and Planning has proposed drastic changes in the reimbursement methodologies to hospitals and home health agencies under the Indiana Medicaid program. The rules have been challenged by the Indiana Hospital Association (IHA) and litigation is pending in federal district court.¹¹⁶

Under the new system, hospitals will be reimbursed for inpatient hospital services provided to Medicaid beneficiaries using a prospective cost-based methodology.¹¹⁷ The *per diem* rate established using this methodology is not to exceed the established rate for a peer group to which the hospital will be assigned.¹¹⁸ The peer group rate will be set at 90% of the weighted median of arrayed *per diem* base year costs for facilities in each peer group.¹¹⁹ Initial rates under the new system will be based on the hospital's inpatient *per diem* fiscal year 1990 allowable costs inflated by the hospital market basket index to the midpoint of the implementation year.¹²⁰ The new methodology for the payment of inpatient hospital services is expected to save \$30.1 million in Medicaid expenditures.¹²¹

Medicaid reimbursement for outpatient hospital services will also be altered to provide for a fee schedule for each procedure or occurrence.¹²² These services will be reimbursed at the lower of the actual charge or the fee schedule amount.¹²³ A maximum allowable payment amount will also be set for services performed by certain practitioners, such as physicians, physical therapists, and oral surgeons.¹²⁴ The new methodology for the payment of outpatient hospital services is expected to save \$27.3 million in Medicaid expenditures.¹²⁵

Finally, the Family and Social Services Administration has issued final rules altering the method of payment for home health agencies. These rules provide that home health agencies will be reimbursed for covered services using standard,

114. See IND. ADMIN. CODE tit. 405 r. 1-4-1 to 1-4-31 (1992).

115. 17 Ind. Reg. 1625 (1994).

116. Indiana Hosp. Ass'n v. Indiana Family & Social Servs. Admin., Cause No. IP94-366C (S.D. Ind. filed Feb. 11, 1994).

117. 17 Ind. Reg. 738, 739 (1994) (adding IND. ADMIN. CODE tit. 405, r. 1-10-3).

118. *Id.*

119. *Id.*

120. *Id.*

121. 16 Ind. Reg. 2704, 2706 (1993) (proposed rules).

122. 17 Ind. Reg. 735, 736 (1994) (adding IND. ADMIN. CODE tit. 405, r. 1-8-2).

123. *Id.* (adding IND. ADMIN. CODE tit. 405, r. 1-8-3).

124. *Id.* at 737 (adding IND. ADMIN. CODE tit. 405, r. 1-11-1, 1-11-2).

125. 16 Ind. Reg. 2701, 2704 (1993) (proposed rules).

statewide rates.¹²⁶ Annual rate increases will be limited to the rate of increase for the most recently published HCFA home health agency input price index.¹²⁷ These rules have been challenged and litigation is pending in the Delaware Superior Court.¹²⁸

D. Summary of 1993 Indiana Medicaid Law

The cases decided in the Medicaid area this year create some fairly clear rules, although some room for litigation still exists. The courts have determined that an applicant for Medicaid benefits may spend down his or her resources to meet the Department's eligibility requirements if the applicant meets the SSI eligibility criteria. The courts also denied the claim of Indiana's nursing facilities that the Department's rules fail to provide adequate reimbursement for efficiently operated facilities. The Department must now determine how it will apply the holdings in these cases to provide benefits through the state's Medicaid program in a manner that provides for the equitable distribution of resources within state budgetary constraints. In addition, the Department faces additional legal challenges as it works to provide a reimbursement system for the state's Medicaid program that contains costs. These legal challenges will undoubtedly delay the implementation of any new system, no matter how effective it may be in easing the Medicaid budget problem in this state.

III. AIDS

In 1993, the Indiana courts were faced with the issue of whether an employer with a self-funded insurance plan may revise the plan to provide limits on the benefits provided for the treatment of acquired immune deficiency syndrome (AIDS). Effective January 1, 1988, Lincoln Foodservice Products, Inc., (Lincoln) revised its self-funded insurance plan to include a \$1,000,000 maximum lifetime benefit for all major medical expenses except expenses for the treatment of AIDS or AIDS-related complex (ARC), which were subject to an annual limit of \$25,000 and a maximum lifetime benefit of \$50,000.

The plaintiff, Kenneth Westhoven, was employed by Lincoln in 1982. He continued to work there until 1989, when he was permanently disabled by AIDS. Mr. Westhoven informed Lincoln in December, 1988, that he tested positive for

126. 17 Ind. Reg. 1753, 1755 (adding IND. ADMIN. CODE tit. 405, r.1-4.1-4).

127. *Id.*

128. *BMH Homecare Servs., Inc. v. Indiana Family & Social Servs. Admin.*, No. 18D03-9309-CP-166 (Delaware Sup. Ct. filed Sept. 14, 1993) (alleging that the new rate system is illegal because the 1987 rates have no relationship to the actual fees and charges paid in the community for home care services and therefore reimburse providers at levels below their costs in violation of state Medicaid law). *See also* Eric B. Schoch, *Lawsuit Challenges Medicaid Cutbacks*, INDPLS. STAR, Dec. 29, 1993, at A1.

AIDS. He later sued Lincoln, claiming that Lincoln's plan resulted in unlawful discrimination on the basis of handicap under the Indiana Civil Rights Law (ICRL). The Indiana Civil Rights Commission (ICRC) determined that the plan violated the ICRL and that the ICRL is not preempted by the Employee Retirement Income Security Act (ERISA).¹²⁹ The court of appeals disagreed.¹³⁰

The court noted that ERISA preempts "any and all State laws insofar as they may now or hereafter relate to any employee benefit plan."¹³¹ The court added, however, that the scope of preemption is not absolute because ERISA "permits certain independent, albeit potentially inconsistent or contradictory, state action in specified areas of local interest and concern."¹³² In addition, plans governed by ERISA are subject to federal laws that impact employee benefit plans.¹³³

The court first determined that the Rehabilitation Act of 1973 (Rehabilitation Act)¹³⁴ is not preempted by ERISA.¹³⁵ Lincoln was not subject to the Rehabilitation Act because it is not a federal contractor. Although the ICRL includes mirror provisions of the Rehabilitation Act that are applicable to private contractors, the provisions of the ICRL are not federal law and do not trigger ERISA preemption.¹³⁶

Next, the court determined that although the Americans with Disabilities Act of 1990 (ADA)¹³⁷ prohibits discrimination on the basis of handicap, Lincoln was not bound by the ADA at the time it revised its health insurance plan.¹³⁸ Therefore, the court concluded, ERISA preempts the ICRL, and the ICRC did not have jurisdiction to act on Mr. Westhoven's discrimination claim.¹³⁹

Because the ADA is applicable to similar actions by employers today, a plaintiff will be more likely to prevail on a similar claim. The ADA prevents discrimination in "employee compensation . . . and other terms, conditions, and privileges of employment."¹⁴⁰ The ADA does not, however, prohibit insurers

129. Further detail concerning the ICRC's decision can be found in Vaneeta M. Kumar & Eleanor D. Kinney, *Indiana Lawmakers Face National Health Policy Issues*, 25 IND. L. REV. 1271, 1281-85 (1992).

130. *Westhoven v. Lincoln Foodservice Products, Inc.*, 616 N.E.2d 778, 780 (Ind. Ct. App. 1993).

131. *Id.* at 781 (quoting 29 U.S.C. § 1144(a)).

132. *Id.*

133. *Id.* at 782.

134. 29 U.S.C.A. §§ 701-797b (1985 & Supp. 1993).

135. *Westhoven*, 616 N.E.2d at 783.

136. *Id.*

137. 42 U.S.C. §§ 12101-12213 (Supp. 1993).

138. *Westhoven*, 616 N.E.2d at 784.

139. *Id.* Cf. *McGann v. H & H Music Co.*, 946 F.2d 401 (5th Cir. 1991) (decrease in benefit for the treatment of AIDS did not result in impermissible discrimination under ERISA), *cert. denied sub nom.* *Greenberg v. H & H Music Co.*, 113 S. Ct. 482 (1992).

140. 42 U.S.C.A. § 12112(a) (West Supp. 1993).

from classifying risks or administering the terms of a bona fide employee benefit plan.¹⁴¹ If, however, an employer alters a self-funded plan for reasons other than business necessity, that employer may be found to have violated the provisions of the ADA. Therefore, the holding of the *Westhoven* decision should not be applied as a bright line rule in determining whether an employer has engaged in illegal conduct by altering the terms of an employee benefit plan.

IV. PEER REVIEW AND MEDICAL STAFF RELATIONS

Two cases of interest were decided this year that involve the discipline of physicians by a hospital peer review committee. These cases involve the concept of intracorporate immunity and the composition of peer review committees reviewing the actions of physicians in hospitals.

A. *Intracorporate Immunity*

This year, the Seventh Circuit Court of Appeals adopted the doctrine of intracorporate immunity for the actions of a hospital in the peer review process.¹⁴² After his medical staff privileges were terminated, Dr. Joseph Pudlo brought an antitrust claim under Section One and Section Two of the Sherman Act against Resurrection Medical Center, ten internists who were in competition with him, the Medical Center's Executive Committee, its Chief Executive Officer, and members of the governing board. During the peer review process, the Medical Center's Executive Committee, which consisted of members of the medical staff, recommended that Dr. Pudlo's privileges not be terminated. Its governing board rejected the recommendation and terminated Dr. Pudlo's medical staff appointment.

141. Subchapters I through III of this chapter and title IV of this Act shall not be construed to prohibit or restrict—

(1) an insurer, hospital or medical service company, health maintenance organization, or any agent, or entity that administers benefit plans, or similar organizations from underwriting risks, classifying risks, or administering such risks that are based on or not inconsistent with State law; or

(2) a person or organization covered by this chapter from establishing, sponsoring, observing or administering the terms of a bona fide benefit plan that are based on underwriting risks, classifying risks, or administering such risks that are based on or not inconsistent with State law; or

(3) a person or organization covered by this chapter from establishing, sponsoring, observing or administering the terms of a bona fide benefit plan that is not subject to State laws that regulate insurance.

Paragraphs (1), (2), and (3) shall not be used as a subterfuge to evade the purposes of subchapters I and III of this chapter.

Id. § 12201(c).

142. *Pudlo v. Adamski*, 2 F.3d 1153 (7th Cir. 1993), *petition for cert. filed*, 62 U.S.L.W. 3350 (U.S. Nov. 4, 1993).

The District Court for the Northern District of Illinois rejected Dr. Pudlo's claims based on its acceptance of the intracorporate immunity doctrine articulated in *Copperweld Corp. v. Independence Tube Corp.*¹⁴³ The court noted that the Medical Center's governing board delegated peer review decision-making authority to its medical staff, making its medical staff an integral component of the Medical Center's management structure.¹⁴⁴ Therefore, the medical staff acted as an officer of the corporation.¹⁴⁵

The court also reasoned that, although the individual members of the medical staff were competitors and were capable of conspiring among themselves, the governing board retained ultimate authority over the decision to revoke Dr. Pudlo's privileges.¹⁴⁶ Therefore, the medical staff's actions could not have resulted in antitrust injury to the physician.¹⁴⁷ In addition, because the Medical Center lacked the capacity to conspire with its medical staff under the doctrine of intracorporate immunity for purposes of Section One of the Sherman Act, it could not conspire with the medical staff for purposes of Section Two.¹⁴⁸

On appeal, the Seventh Circuit adopted the district court's opinion and stated that it was adopting the position that under the doctrine of intracorporate immunity, a hospital is legally incapable of conspiring with its medical staff in the peer review process when the medical staff acts through the delegation of authority by the hospital's governing board.¹⁴⁹

143. *Pudlo v. Adamski*, 789 F. Supp. 247, 250-52 (N.D. Ill. 1992) (citing *Copperweld Corp. v. Independence Tube Corp.*, 467 U.S. 752 (1984)), *aff'd*, 2 F.3d 1153 (7th Cir. 1993), *cert. denied*, 114 S. Ct. 879 (1994). The court noted that *Copperweld* is "widely cited" for the following propositions:

(1) an agreement between a parent corporation and its wholly-owned subsidiary is not a concerted action for purposes of Section 1; (2) an agreement between officers or employees of the same firm does not ordinarily constitute a Section 1 conspiracy; and (3) a corporation is legally incapable of conspiring with its agents or employees.

Id.

144. *Id.* at 251.

145. *Id.*

146. *Id.*

147. *Id.* at 252.

148. *Pudlo*, 789 F. Supp. at 252.

149. *Pudlo*, 2 F.3d at 1154. *See also* *Okansen v. Page Mem. Hosp.*, 945 F.2d 696 (4th Cir. 1991) (applying the doctrine of intracorporate immunity to an alleged conspiracy between a hospital and members of its medical staff, but recognizing that members of the medical staff could conspire among themselves), *cert. denied*, 112 S. Ct. 973 (1992); *Nanavanti v. Burdette Tomlin Mem. Hosp.*, 857 F.2d 96, 118 (3d Cir. 1988) (hospital cannot conspire with executive committee); *Weiss v. York Hosp.*, 745 F.2d 786, 814-15 (3d Cir. 1984) (a hospital cannot conspire with its medical staff; however, individual doctors on the medical staff may form a conspiracy), *cert. denied*, 470 U.S. 1060 (1985). *But see* *Bolt v. Halifax Medical Ctr.*, 891 F.2d 810, 819 (11th Cir. 1990) ("we hold that a hospital and the members of its medical staff are all legally capable of conspiring with one another"), *cert. denied*, 495 U.S. 924 (1990).

B. Committee Composition

In *Mann v. Johnson Memorial Hospital*,¹⁵⁰ the Indiana Court of Appeals held that the Johnson Memorial Hospital Bylaws, which allowed members of the Board of Trustees and hospital administration to sit on an *ad hoc* committee formed to review the actions of physicians, did not comply with the Indiana peer review statute.¹⁵¹ The hospital's Board of Trustees brought charges against Dr. Michael Mann seeking to terminate his clinical privileges. An *ad hoc* committee was appointed to hear the evidence against Dr. Mann. Dr. Mann unsuccessfully sought to enjoin the committee's proceedings.

The hospital's bylaws contained the following provisions:

Whenever the professional review action could lead to a reduction or suspension of clinical privileges for a member, the Board of Trustees in its discretion, may . . . (3) appoint an Ad Hoc Hearing Committee as provided in Section 4.5 and proceed directly to a hearing as provided in Article IV.

. . . .
The Ad Hoc Hearing Committee may include . . . members of the Board of Trustees, . . . Hospital Administration, . . . members of the Medical Staff . . . practitioners who are not members of the Medical Staff. . . .¹⁵²

Dr. Mann argued that these provisions were in violation of the requirement in the Indiana peer review statute that a professional health care provider in a hospital is entitled to an evidentiary hearing "before a peer review committee of the medical staff."¹⁵³ The court of appeals agreed.¹⁵⁴

The court noted that, even if the hospital's bylaws conformed to the requirements of the Health Care Quality Improvement Act of 1986,¹⁵⁵ they must also conform to any additional procedural safeguards provided by state

150. 611 N.E.2d 676 (Ind. Ct. App. 1993).

151. *Id.* at 679.

152. *Id.* at 677.

153. *Id.*

(e) However, if charges are brought against a professional health care provider in a hospital that, if sustained by the governing board of the hospital, could result in an action against a physician required to be reported to the medical licensing board . . . or a similar disciplinary action against any other health care provider, the professional health care provider is entitled to one (1) evidentiary hearing before a peer review committee of the medical staff and one (1) additional hearing on appeal before the governing board of the hospital.

IND. CODE § 34-4-12.6-2(e) (1993).

154. *Mann*, 611 N.E.2d at 679.

155. 42 U.S.C.A. §§ 11101-11052 (Supp. 1993).

law.¹⁵⁶ The court then declared that it would “follow the plain language of the statute” and declared the bylaws to be unlawful.¹⁵⁷

C. Summary of 1993 Peer Review Cases

Taken together, these two decisions provide that a physician practicing in a hospital is entitled to one hearing before a peer review committee composed entirely of members of the medical staff. If, however, the governing board delegates its authority to such a committee, the actions of the committee will be protected under the Indiana peer review statute and the hospital's actions will be protected from challenge under the antitrust laws under the doctrine of intracorporate immunity.

V. RECENT FEDERAL DEVELOPMENTS

The previous sections of this Article outline rules that govern the actions of health care providers within our current health care system. It is important to keep these rules in mind as the nation moves toward a restructuring of our entire health care system that promises to provide a special role for the states. Unfortunately, the scope of this Survey does not permit an in-depth discussion of the various proposals for nationwide change. However, a few changes have been made that, when considered in conjunction with these proposals, may act to place limits on the actions of providers as they scramble to form networks and integrated delivery systems to prepare for a system of managed competition. This section of the Article provides a brief description of these changes.

A. The Anti-Referral Provisions of OBRA '93

The Omnibus Budget Reconciliation Act of 1993 (OBRA '93),¹⁵⁸ which was passed in August, includes provisions that extend the anti-referral provisions of the Stark Act.¹⁵⁹ Under the Stark Act, physicians are prohibited from referring patients for clinical laboratory services to any entity in which the physician or a member of the physician's immediate family has a financial interest and prohibits entities accepting such referrals from billing for the services rendered as a result of the referral.¹⁶⁰ The prohibition against the referral of patients now extends to entities providing “designated health services.” The designated health services covered by OBRA '93 include clinical laboratory services; physical and occupational therapy services; radiology and other diagnostic services; radiation therapy services; durable medical equipment;

156. *Mann*, 611 N.E.2d at 678.

157. *Id.* at 678-79.

158. Omnibus Budget Reconciliation Act of 1993, Pub. L. No. 103-66, § 13562(a)(1) (to be codified at 42 U.S.C. § 1395nn).

159. 42 U.S.C.A. § 1395nn (Supp. 1993). These provisions are also known as “Stark II.”

160. *Id.* § 1395nn(a).

parenteral and enteral nutrients, equipment, and supplies; prosthetics, orthotics, and prosthetic devices; home health services; outpatient prescription drugs; and inpatient and outpatient hospital services.¹⁶¹

The ownership interests that will cause a physician to be subject to the anti-referral provisions include any ownership or investment interest in or compensation arrangement with an entity that provides designated health services.¹⁶² An ownership or investment interest includes any equity, debt, or other financial interest as well as any interest in an entity that holds an ownership or investment interest in an entity providing designated health services.¹⁶³ Exceptions for certain ownership interests are provided, including ownership of publicly traded securities, ownership interests in certain entities in rural areas, and investment interests in hospitals if the interest is not in a subdivision of the hospital.¹⁶⁴

The compensation arrangements covered by OBRA '93 include any arrangement involving remuneration between a physician or a member of the physician's immediate family and an entity providing designated health services. The types of remuneration covered include any remuneration "directly or indirectly, overtly or covertly, in cash or in kind."¹⁶⁵ OBRA '93 also provides exceptions for certain financial arrangements, including the rental of office space, equipment rental, compensation to an employee, personal services arrangements, physician incentive plans, remuneration unrelated to the provision of designated health services, physician recruitment arrangements, isolated transactions, group practice arrangements with hospitals, and payments by physicians for items or services.¹⁶⁶ Three general exceptions are also provided, including exceptions for services provided personally by another member of the physician's practice group, certain in-office ancillary services, and services provided by certain prepaid plans.¹⁶⁷

B. The Proposed Safe Harbors

On September 21, 1993, the Office of the Inspector General issued proposed rules for an additional seven safe harbors that will provide protection from civil and criminal liability under the Medicare-Medicaid Anti-Kickback Statute.¹⁶⁸ The anti-kickback statute provides that anyone who knowingly solicits, receives,

161. Omnibus Budget Reconciliation Act of 1993, Pub. L. No. 103-66, § 13562(a)(1) (to be codified at 42 U.S.C. § 1395nn(h)(6)).

162. *Id.* § 13562(a)(1).

163. *Id.*

164. *Id.* § 13562(c), (d).

165. *Id.* § 13562 (to be codified at 42 U.S.C. § 1395nn(h)(1)(B)).

166. *Id.* § 13562 (to be codified at 42 U.S.C. § 1395nn(e)).

167. *Id.* § 13562 (to be codified at 42 U.S.C. § 1395nn(b)).

168. Health Care Programs: Fraud and Abuse; Additional Safe Harbor Provisions Under the OIG Anti-Kickback Statute, 58 Fed. Reg. 49008 (1993).

offers, or pays any remuneration for the referral of an individual for the furnishing or arranging of any item or service payable by Medicare or Medicaid or who purchases, leases, orders, arranges for, or recommends purchasing, leasing, or ordering any good, service, or item payable by Medicare or Medicaid commits a felony and may be subject to imprisonment, fines, civil monetary penalties, and exclusion from the Medicare and Medicaid programs.¹⁶⁹

Currently, eleven safe harbors have been promulgated that provide immunity from civil and criminal liability under the anti-kickback statute.¹⁷⁰ However, these safe harbors are not easily applied and provide protection for only a very narrow segment of the activities in which health care providers engage.

The proposed safe harbors include immunity under certain circumstances for investment interests in rural areas, ambulatory surgical centers, and group practices composed of active investors; practitioner recruitment by rural hospitals; obstetrical malpractice payment subsidies; referral agreements for specialty services; and cooperative hospital service organizations.¹⁷¹ Unfortunately, these safe harbors do not provide much protection for health care providers outside rural areas. Because of their limited utility, it is unlikely that practitioners will feel any increased sense of comfort in determining whether their behavior falls within the confines of a statute that encompasses a number of activities.

C. The Medicare Anti-Dumping Statute

This year, the Seventh Circuit Court of Appeals sought to extend the limits of the Emergency Treatment and Active Labor Act (EMTLA), which is also known as the Medicare "anti-dumping" statute,¹⁷² by including within its purview triage activities that are performed before a patient arrives in the emergency department. On February 2, 1990, a one-year-old infant in respiratory arrest was transported by paramedics who contacted a telemetry operator at the University of Chicago Hospital. The hospital redirected the ambulance to St. Bernard's Hospital because the University of Chicago Hospital pediatric intensive care unit was on partial bypass. After emergency treatment, the infant was transferred to Cook County Hospital because St. Bernard's Hospital did not have a pediatric intensive care unit in which to treat her. The infant's mother brought an action against the University of Chicago Hospital, claiming various common law torts and a violation of the anti-dumping statute.

The District Court for the Northern District of Illinois granted the defendant's motion to dismiss. The Seventh Circuit Court of Appeals originally reversed, agreeing with the argument made by the infant's mother that the anti-dumping

169. See 42 U.S.C.A. § 1320a-7b(b) (West Supp. 1993).

170. 42 C.F.R. § 1101.952 (1993).

171. Health Care Programs: Fraud and Abuse; Additional Safe Harbor Provisions Under the OIG Anti-Kickback Statute, 58 Fed. Reg. 49008 (1993).

172. 42 U.S.C.A. § 1395dd (West 1992).

statute applies when a hospital has been informed of a patient's medical condition, even though the patient has not "come to" the hospital's emergency department.¹⁷³ The Seventh Circuit later vacated its decision, holding that the infant never "came to" the emergency department and therefore, the University of Chicago Hospital's actions in providing instructions through its telemetry service were not actionable under the anti-dumping statute.¹⁷⁴ Therefore, for the anti-dumping statute to apply, a patient must be refused stabilizing treatment at or after the time the patient presents himself in the emergency department.

VI. CONCLUSION

This Article describes only a few of the changes which are driving the health care system in Indiana. Undoubtedly, as our nation moves toward a more unified system of health services delivery, further changes in the laws, rules, and decisions affecting health care lawyers, health care providers, and patients will be made in a very short period of time. Only after further debate will the legislature and the courts find the best solutions to the multitude of problems facing our health care system today. In 1994, health care lawyers should keep their eye toward national changes and the role of the states in implementing those changes. Hopefully, even better solutions are near at hand.

173. *Johnson v. University of Chicago Hosps.*, 774 F. Supp. 510 (N.D. Ill. 1991), *aff'd in part, rev'd in part*, 982 F.2d 230 (7th Cir. 1993) (per curiam).

174. *Johnson*, 982 F.2d at 233.

RECENT DEVELOPMENTS IN CIVIL RICO LAW

BART A. KARWATH*

INTRODUCTION

In 1970, Congress enacted the Racketeer Influenced and Corrupt Organizations statute ("RICO").¹ RICO prohibits certain conduct involving a pattern of racketeering activity.² Specifically, RICO prohibits: (1) using income derived from a pattern of racketeering activity to acquire, establish or operate an enterprise engaged in or affecting interstate commerce; (2) acquiring or maintaining an interest in or control of an enterprise engaged in or affecting interstate commerce through a pattern of racketeering activity; (3) conducting or participating in the affairs of an enterprise engaged in or affecting interstate commerce through a pattern of racketeering activity; and (4) conspiring to take any action prohibited by RICO.³ In addition to criminal penalties,⁴ RICO provides a cause of action for plaintiffs who are injured in their business or property by reason of a RICO violation, and provides for recovery of treble damages, costs, and reasonable attorney's fees.⁵ RICO's treble damages provision, and RICO's seemingly broad scope, have produced an increasing amount of civil RICO litigation.⁶ This article discusses recent civil RICO cases

* Law Clerk to the Honorable Larry J. McKinney, United States District Court for the Southern District of Indiana. B.S., 1988, Indiana University School of Public & Environmental Affairs; J.D., 1991, Indiana University School of Law—Bloomington. The author thanks Guy Ward for reviewing and making helpful comments on a draft of this Article. The views expressed are solely those of the author.

1. 18 U.S.C. §§ 1961-68. RICO was created in Title IX of the Organized Crime Control Act of 1970, Pub. L. No. 91-452, 84 Stat. 922, 941-48 (1970).

2. RICO also prohibits certain conduct involving the collection of unlawful debt. *See* 18 U.S.C. § 1962.

3. *See* 18 U.S.C. § 1962.

4. 18 U.S.C. § 1963.

5. 18 U.S.C. § 1964(c).

6. *See* *Montesano v. Seafirst Commercial Corp.*, 818 F.2d 423, 424 (5th Cir. 1987) ("An imaginative plaintiff could take virtually any illegal occurrence and point to acts preparatory to the occurrence . . . as meeting [RICO's requirements.]"); *Wolin v. Hanley Dawson Cadillac, Inc.*, 636 F. Supp. 890, 891 (N.D. Ill. 1986) ("RICO's lure of treble damages and attorneys' fees draws litigants and lawyers . . . like lemmings to the sea."); S. REP. NO. 269, 101st Cong., 2d Sess. 3-4 (1990) ("Civil filings under . . . [RICO] have increased more than eight-fold over the last five years, to nearly a thousand cases during calendar year 1988. While that number has held steady during the past three years, there is every reason to expect a substantial increase in this already high number because of the statute's lucrative treble damages provisions and the extensive coverage recently afforded civil RICO actions by the national media, legal publication, and continuing education programs.") (quoting Chief Justice Rehnquist, Speech at the Brookings Eleventh Seminar on the Administration of Justice (Apr. 7, 1989)).

The increasing importance of civil RICO in contemporary jurisprudence is revealed by the number of RICO symposiums held by legal publications to mark RICO's twentieth anniversary: *Law*

decided by the United States Supreme Court and the United States Court of Appeals for the Seventh Circuit.

I. RECENT SUPREME COURT DEVELOPMENTS

A. *The Operation or Management Test*

In *Reves v. Ernst & Young*,⁷ the Court resolved a conflict among the federal circuits over the meaning of the phrase "to conduct or participate, directly or indirectly, in the conduct of [an] enterprise's affairs," as used in the following provision of RICO located at § 1962(c): "It shall be unlawful for any person employed by or associated with any enterprise engaged in, or the activities of which affect, interstate commerce, to conduct or participate, directly or indirectly, in the conduct of such enterprise's affairs through a pattern of racketeering activity"⁸ The factual setting in *Reves* involved an accounting firm, Arthur Young, which prepared audits of the Farmer's Cooperative of Arkansas & Oklahoma, Inc. ("Co-op") in 1981 and 1982.⁹ In connection with the audits, Arthur Young made crucial assumptions pertaining to the value of Co-op's assets, but failed to disclose that Co-op would be insolvent without those assumptions.¹⁰ In 1984, there was a run on Co-op's demand notes which resulted in Co-op filing for bankruptcy.¹¹ As a result, Co-op's demand notes were frozen, and the note holders were unable to redeem their notes at will.¹² A year later, the bankruptcy trustee filed a civil RICO claim against Arthur Young on behalf of Co-op and a class of note holders. The district court granted summary judgment on the civil RICO claim in favor of Arthur Young on the grounds that RICO's prohibition of conducting or participating in the conduct of an enterprise required evidence that the defendant engaged in the operation or management of the enterprise itself.¹³ This requirement was termed the operation or management test.¹⁴ According to the district court, Arthur Young

and the Continuing Enterprise: Perspectives on RICO, 65 NOTRE DAME L. REV. 873 (1990); *Reforming RICO: If, Why, and How?*, 43 VAND. L. REV. 621 (1990); *RICO: Something for Everyone*, 35 VILL. L. REV. 853 (1990); *The 20th Anniversary of the Racketeer Influenced and Corrupt Organizations Act*, 64 ST. JOHN'S L. REV. 701 (1990).

7. 113 S. Ct. 1163 (1993).

8. 18 U.S.C. § 1962(c).

9. The accounting firm that prepared the audit was originally known as Russell Brown and Company, which merged with Arthur Young and Company on January 2, 1982. *Reves*, 113 S. Ct. at 1167. Eventually, Arthur Young became Ernst & Young. *Id.* In order to be consistent with the terminology used by the Court in *Reves*, this article will refer to the accounting firm as "Arthur Young." See *id.* at 1167 n.2.

10. *Reves*, 113 S. Ct. at 1167-68.

11. *Id.* at 1168.

12. *Id.*

13. *Id.*

14. *Id.* at 1169.

was entitled to judgment as a matter of law because the evidentiary material revealed that Arthur Young's accountants reviewed a series of completed transactions and certified that Co-op's records fairly portrayed Co-op's financial status as of three or four months prior to Co-op's annual meetings at which Arthur Young's reports were presented, and that Arthur Young's actions did not constitute management of Co-op.¹⁵ On appeal, the Eighth Circuit affirmed the grant of summary judgment in favor of Arthur Young based on application of the operation or management test.¹⁶ The Supreme Court granted certiorari in *Reves* to resolve a circuit conflict over whether RICO required application of the operation or management test.¹⁷

The Court began its analysis of whether the operation or management test is required by focusing on the meaning of the term "conduct," which is used twice in the phrase at issue. As a verb, the term "conduct" means "to lead, run, manage, or direct."¹⁸ Although conduct is also used as a noun in the statutory language—"participate, directly or indirectly in the *conduct* of [an] enterprise's affairs"—the Court held that when used as both a verb and noun the term requires an element of direction.¹⁹ According to the Court, if an alternate meaning of conduct was intended, "Congress could easily have written 'participate, directly or indirectly, in [an] enterprise's affairs.'"²⁰ The Court also found that the term "participate" means "to take part in."²¹ Based on the meanings it assigned to the terms "conduct" and "participate," the Court held that for a defendant to be liable under the provision "*some* part in directing the enterprise's affairs is required," and that the operation or management test "expresses this requirement in a formulation that is easy to apply."²²

The Court advised that the operation or management test does not limit liability under § 1962(c) to an enterprise's upper management.²³ According to the Court, "[a]n enterprise is 'operated' not just by upper management but also by lower-rung participants in the enterprise who are under the direction of upper management."²⁴ Additionally, the Court noted that "[a]n enterprise also might be 'operated' or 'managed' by others 'associated with' the enterprise who exert control over it as, for example, by bribery."²⁵ In a footnote, the Court explained that an issue left unanswered by its decision in *Reves* was exactly how far down an enterprise's chain of command the operation or management test

15. *Id.* at 1168.

16. *Id.* at 1168-69.

17. *Id.* at 1169.

18. *Id.*

19. *Id.* (emphasis added).

20. *Id.*

21. *Id.* at 1170.

22. *Id.* (emphasis in original).

23. *Id.* at 1173.

24. *Id.*

25. *Id.*

reaches.²⁶ According to the Court, there was no need to address the issue because it was clear that Arthur Young was not acting under the direction of Co-op's upper management, and thus, was not part of Co-op's chain of operations.²⁷ Because the parties did not dispute that the district court and the circuit court had properly applied the operation or management test, the Court affirmed the judgment of the court of appeals.²⁸

Reves changes the law in the Seventh Circuit, which previously rejected the operation or management test and applied a less demanding three-part test which required that the defendant commit racketeering acts, that the defendant's commission of the racketeering acts be facilitated by the defendant having a position in or relationship with the enterprise, and that the racketeering acts have some effect on the enterprise.²⁹ Additionally, because the Supreme Court refused to address exactly how far down an enterprise's chain of operation the operation or management test reaches, an issue that is likely to be raised in future civil RICO actions premised on § 1962(c) is the scope of the requirement. Conflicting decisions and future confusion on this issue may result.

B. Proximate Cause & Standing in Securities Fraud-Based RICO Claims

In *Holmes v. Securities Investor Protection Corp.*,³⁰ the Court determined that a plaintiff must show an injury proximately caused by the defendant's conduct in order to recover treble damages under RICO's civil recovery provisions. At issue was whether a proximate cause requirement could be read into the following statutory language: "[a]ny person injured in his business or property by reason of a violation of [RICO] . . . may sue therefor in any appropriate United States district court and shall recover threefold the damages he sustains and the cost of the suit, including a reasonable attorney's fee."³¹

The Court began its analysis by admitting that the language in question could be read as requiring merely factual—"but for"—causation, but not a showing of proximate cause.³² However, the Court held that such an expansive interpretation would be improper. According to the Court, "[t]he key to the better interpretation lies in some statutory history."³³ Because the language in

26. See *id.* at 1173 n.9

27. *Id.*

28. *Id.* at 1173-74.

29. See *Overnight Transp. Co. v. Truck Drivers, Oil Drivers, Filling Station & Platform Workers Union Local No. 705*, 904 F.2d 391, 393 (7th Cir. 1990); see also *United States v. Quintanilla*, 2 F.3d 1469, 1484 (7th Cir. 1993) (noting that *Reves* changes the law in the Seventh Circuit).

30. 112 S. Ct. 1311 (1992).

31. 18 U.S.C. § 1964(c).

32. *Holmes*, 112 S. Ct. at 1316.

33. *Id.* at 1317.

question was modeled on § 4 of the Clayton Act,³⁴ which had been interpreted to include a proximate cause requirement, the Court held that Congress intended RICO to have a proximate cause requirement.³⁵

Although the Court's decision in *Holmes* answers a question that the Court had not previously considered, the federal courts that had addressed the proximate cause issue, including the Seventh Circuit, "overwhelmingly" found that RICO contains a proximate cause requirement.³⁶ A more important aspect of the Court's decision was that the Court failed to resolve a conflict among the federal courts over whether a person has standing to bring a civil RICO claim based on allegations of securities fraud,³⁷ even though the person neither bought nor sold securities, and thus, is without standing to bring an implied cause of action for securities fraud under § 10(b) of the Securities Act of 1934³⁸ and Securities and Exchange Commission Rule 10b-5.³⁹ Three concurring Justices viewed the standing issue as the "only clearly articulated question on which [the Court] granted certiorari."⁴⁰

The majority opinion declined to reach the RICO standing issue because it believed that all of the standing conflict cases could have been resolved on proximate cause grounds, and thus, addressing the standing issue would not have been proper.⁴¹ However, all four concurring Justices would have reached the issue, and all would have held that a claimant who brings a civil RICO action based on allegations of securities fraud violations need not be a purchaser or seller of securities. The concurring opinion written by Justice O'Connor (the "O'Connor opinion") based its decision on the absence of a purchaser or seller requirement in the text of RICO, which provides a civil cause of action to "any person" injured by reason of a violation of RICO.⁴² The O'Connor opinion rejected the argument that RICO incorporates the standing requirements of the various predicate acts listed in the definition of "racketeering activity." The O'Connor opinion also rejected the argument that even if in general the standing requirements of RICO predicates are not absorbed by RICO, an exception to the rule should be made for RICO predicates which involve fraud in the sale of securities because such a standing requirement is well-established for private

34. 15 U.S.C. § 15.

35. *Holmes*, 112 S. Ct. at 1317 (quoting *Associated Gen. Contractors of Cal., Inc. v. Carpenters*, 459 U.S. 519, 534 (1983)).

36. *Id.* at 1317 n.11; see *Haroco, Inc. v. American Nat'l Bank & Trust Co. of Chicago*, 747 F.2d 384, 389 (7th Cir. 1984), *aff'd per curiam*, 473 U.S. 606 (1985).

37. See *Holmes*, 112 S. Ct. at 1321-22 & n.23 (discussing conflict).

38. 15 U.S.C. § 78j(b).

39. 17 C.F.R. § 240.10b-5.

40. *Holmes*, 112 S. Ct. at 1322 (O'Connor, J., White, J., and Stevens, J., concurring in part and concurring in judgment). Justice Scalia filed a separate concurring opinion.

41. *Id.*

42. *Id.* at 1323.

securities fraud actions.⁴³ The O'Connor opinion noted that RICO's language specifies that there must be an "offense involving . . . fraud in the sale of securities . . . punishable under any law of the United States," and thus, requires only that there be an act which constitutes fraud in the sale of securities that can be punished criminally.⁴⁴ Because there is no purchaser or seller requirement to establish a criminal violation of § 10(b) and Rule 10b-5, the O'Connor opinion found no basis to impose a purchaser or seller requirement for civil RICO claims based on those securities fraud provisions.⁴⁵

The concurring opinion written by Justice Scalia (the "Scalia opinion") focused its discussion on a zone of interests standing requirement.⁴⁶ Although the Scalia opinion was guided by RICO's provision of a cause of action to "any person" injured by a RICO violation, the Scalia opinion stressed that the zone of interests standing requirement limits the set of persons with standing to sue under RICO to those persons who the underlying racketeering offenses seek to protect.⁴⁷ Accordingly, the Scalia opinion advocated a standing analysis that considers each RICO predicate and determines the set of persons the RICO predicate is intended to protect.⁴⁸

The impact of *Holmes* is two-fold. First, the Court confirmed the law of the Seventh Circuit that a civil RICO claimant must have an injury that is proximately caused by the defendant's unlawful acts.⁴⁹ Second, by specifically reserving judgment on whether a civil RICO claimant must be a purchaser or seller of securities to bring a civil RICO claim predicated on securities fraud, the Court allowed the conflict among the courts over the standing requirement to continue. Whether the majority is correct that the standing issue is resolved by the Court's decision concerning RICO's proximate cause requirement is likely to be the subject of future civil RICO litigation. However, to the extent courts find that the purchaser or seller standing issue survives, the discussion of the standing issue in the O'Connor and Scalia opinions may provide the courts with some guidance in resolving the issue.⁵⁰

43. *Id.* at 1324.

44. *Id.* at 1323 (quoting 18 U.S.C. § 1961(1)).

45. *Id.* at 1324-25.

46. *Id.* at 1328.

47. *Id.*

48. *See id.* at 1328-29.

49. *See Haroco v. American Nat'l Bank & Trust Co.*, 747 F.2d 384, 398 (7th Cir. 1984), *aff'd per curiam*, 473 U.S. 606 (1985).

50. For additional discussion of the probable impact of *Holmes* on the purchaser-seller standing issue for civil RICO claims, see Virginia G. Maurer, *Holmes v. SIPC: A New Direction for RICO Standing?*, 5 U. FLA. J.L. & PUB. POL'Y 73, 95-102 (1992) (explaining why proximate cause analysis is not enough to resolve standing issue and advocating adoption of the zone of interests analysis set out in the Scalia opinion); Jonathan Coe, Comment, *Holmes v. Securities Investor Protection Corp.: A Disappointing Attempt to Limit RICO Actions for Securities Fraud*, 70 DENV. U. L. REV. 413, 421-26 (1993) (predicting continued conflict among the federal courts on the purchaser-seller standing issue, and advocating RICO's adoption of the purchaser-seller standing

C. Economic Motive Requirement

In *National Organization for Women, Inc. v. Scheidler*, the Supreme Court resolved a conflict among the federal courts over whether RICO requires an economic motive.⁵¹ The civil RICO claims in *Scheidler* were brought in the United States District Court for the Northern District of Illinois by two health care centers⁵² against a coalition of antiabortion groups known as the Pro-Life Action Network ("PLAN") and others who oppose legal abortion.⁵³ According to the health care centers, PLAN and the other defendants were part of a nationwide conspiracy aimed at closing abortion clinics by engaging in a pattern of racketeering activity,⁵⁴ which included extortion in violation of the Hobbs Act.⁵⁵ The district court dismissed the health care centers' RICO claims for failure to state a claim on which relief could be granted because there had been no allegation that the defendants' actions had a "profit-generating purpose."⁵⁶

On appeal, the Seventh Circuit affirmed the district court's decision in *Scheidler*, and joined other federal courts in reading an economic motive requirement into RICO's enterprise element.⁵⁷ The court of appeals based its decision mainly on the analysis contained in three criminal RICO cases decided by the Second Circuit, which held that RICO contains such a requirement.⁵⁸ In the first case, *United States v. Ivic*,⁵⁹ the Second Circuit considered RICO's legislative history, Supreme Court precedent, and United States Department of Justice guidelines, and determined that a RICO violation requires that either the

requirement).

51. 114 S. Ct. 798, 802 (1994).

52. The health centers are the Delaware Women's Health Organization and the Summit Women's Health Organization. *Scheidler*, 114 S. Ct. at 801 and 802. Although the National Organization for Women ("NOW") was also listed as a plaintiff in the complaint, the district court did not rule on NOW's motion for class certification prior to dismissing the RICO claims. *See id.* at 802 n.3.

53. *Id.* at 801.

54. *See id.*

55. The Hobbs Act, 18 U.S.C. § 1951, provides:

(a) Whoever in any way or degree obstructs, delays, or affects commerce or the movement of any article or commodity in commerce, by robbery or extortion or attempts or conspires so to do, or commits or threatens physical violence to any person or property in furtherance of a plan or purpose to do anything in violation of this section shall be fined not more than \$10,000 or imprisoned not more than twenty years, or both.

(b) As used in this section —

....

(2) the term "extortion" means the obtaining of property from another, with his consent, induced by wrongful use of actual or threatened force, violence, or fear, or under color of official right.

56. *National Org. for Women v. Scheidler*, 765 F. Supp. 937, 943 (N.D. Ill. 1991).

57. *National Org. for Women v. Scheidler*, 968 F.2d 612, 625-630 (7th Cir. 1992).

58. *See id.* at 627-29.

59. 700 F.2d 51 (2d Cir. 1983).

enterprise or the racketeering activity be economically motivated.⁶⁰ In *United States v. Bagaric*,⁶¹ and *United States v. Ferguson*,⁶² respectively, the Second Circuit emphasized that RICO does not require that there be solely an economic motive, but only that “either the predicate acts or the enterprise be geared toward economic gain,”⁶³ and “that RICO requires only that there be ‘some financial purpose.’”⁶⁴ The Seventh Circuit also found that although the Supreme Court has instructed courts to avoid establishing “undue limitations [on] civil RICO,” the Supreme Court has frequently discussed RICO in the context of “business-es.”⁶⁵ According to the Seventh Circuit in *Scheidler*, this “emphasis on business — economic activity — bolsters” the conclusion that RICO requires an economic motive.⁶⁶

The Supreme Court granted certiorari in *Scheidler* to resolve the conflict over whether RICO requires an economic motive.⁶⁷ In a unanimous decision, the Court rejected the Seventh Circuit’s analysis and concluded that RICO contains no economic motive requirement.⁶⁸ The Court began its discussion of the economic motive issue by looking at RICO’s statutory provisions. The Court noted that the definition of “enterprise” in RICO is broad,⁶⁹ and provides no basis for adopting an economic motive requirement.⁷⁰ The Court found unpersuasive the argument that the term “enterprise,” as used in some of RICO’s substantive provisions, indicates that Congress intended the term to establish a general economic motive requirement. The provisions in question prohibit acquiring an interest in an enterprise with income gained through a pattern of racketeering activity, or acquiring control of an enterprise through a pattern of

60. See *Scheidler*, 968 F.2d at 627 (discussing *Ivic*).

61. 706 F.2d 42 (2d Cir.), cert. denied, 464 U.S. 840 (1983).

62. 758 F.2d 843 (2d Cir.), cert. denied, 474 U.S. 1032 (1985).

63. *Scheidler*, 968 F.2d at 628 (discussing *Bagaric*).

64. *Id.* (quoting *Ferguson*, 758 F.2d at 853).

65. *Id.* at 629.

66. *Id.*

67. 114 S. Ct. at 801.

68. *Id.* at 803-06.

69. RICO’s definition of enterprise provides: “‘enterprise’ includes any individual, partnership, corporation, association, or other legal entity, and any union or group of individuals associated in fact although not a legal entity.” 18 U.S.C. § 1961(4).

70. *Scheidler*, 114 S. Ct. at 803-04.

racketeering activity.⁷¹ The Court observed that in either case the enterprise need not be a profit-seeking entity.⁷²

Next, the Court considered whether RICO's legislative history reveals a congressional intent for an economic motive requirement. The Court disapproved of the Second Circuit's decision in *Bagaric*,⁷³ which had found an economic motive implied in the congressional statement of findings that preface RICO which contain language noting that billions of dollars are drained from the American economy by criminal group activity.⁷⁴ According to the Court in *Scheidler*, criminal group activity can affect the economy even if not aimed at providing a financial benefit to the perpetrators.⁷⁵ The Court stressed that RICO's language was unambiguous, and that there was no basis for finding a "clearly expressed legislative intent" that courts should ignore RICO's unambiguous language and impose an economic motive requirement.⁷⁶

The Court found no grounds for adopting an economic motive requirement based on deference to the Department of Justice's guidelines for RICO prosecutions, which, according to the Seventh Circuit in *Scheidler*, limit RICO prosecutions brought by the federal government to cases that involve criminal activity with an economic goal.⁷⁷ According to the Court, "[w]hatever may be the appropriate deference afforded to such internal rules . . . the Department of Justice [has] amended its guidelines [to] provide that an . . . enterprise must be 'directed toward an economic or other identifiable goal.'"⁷⁸ Similarly, the Court found no reason to apply the rule of lenity in criminal cases to the issue whether an economic motive requirement should be grafted on RICO. According to the Court, the rule of lenity applies only where the Court is faced with an ambiguous criminal statute; it does not mandate an "over-riding consideration of being lenient to wrongdoers" in every case.⁷⁹

71. The substantive provisions in question are 18 U.S.C. §§ 1962(a) and (b), which provide:

(a) It shall be unlawful for any person who has received any income derived, directly or indirectly, from a pattern of racketeering activity . . . to use or invest, directly or indirectly, any part of such income, or the proceeds of such income in, or the establishment or operation of, any enterprise which is engaged in, or the activities of which affect, interstate or foreign commerce. . . .

(b) It shall be unlawful for any person through a pattern of racketeering activity . . . to acquire or maintain, directly or indirectly, any interest in or control of any enterprise which is engaged in, or the activities of which affect, interstate or foreign commerce.

72. *Scheidler*, 114 S. Ct. at 804.

73. 706 F.2d at 57 n.13.

74. See *Scheidler*, 114 S. Ct. at 805.

75. *Id.*

76. *Id.* at 806.

77. *Id.*

78. *Id.* (quoting U.S. Dept. of Justice, United States Attorney's Manual § 9-110.360 (Mar. 9, 1984)) (emphasis added by the Court).

79. *Id.* (quoting *United States v. Turkette*, 452 U.S. 576, 587-88 n.10 (1981)).

In a concurring opinion, Justice Souter, joined by Justice Kennedy, considered the argument that to avoid any possible impact that RICO may have on rights protected by the First Amendment the Court should adopt an economic motive requirement, which the majority opinion refused to address.⁸⁰ The concurring Justices stated that they agreed with the majority that RICO's language is unambiguous, and accordingly, found no reason to apply the established rule that courts should construe an ambiguous statute in a manner that avoids constitutional dilemmas.⁸¹ The concurring Justices expressed their doubt, however, that an economic motive requirement would be an adequate mechanism to avoid constitutional dilemmas if an ambiguity were present. The concurring Justices found the economic motive requirement too restrictive because it would remove conduct that is clearly criminal from RICO's reach so long as the conduct was not aimed at economic gain.⁸² Further, the concurring Justices found that to the extent activities which are clearly protected by the constitution could be characterized as economically motivated, the economic motive requirement would not remove all possible constitutional dilemmas.⁸³ As the concurring opinion explained, "even protest movements need money."⁸⁴ Because "nothing in the Court's opinion precludes a RICO defendant from raising the First Amendment in its defense in a particular case," the concurring Justices cautioned "courts applying RICO to bear in mind the First Amendment interests that could be at stake."⁸⁵

The most important impact of the Supreme Court's decision in *Scheidler*, for purposes of this article, is that it changes the law in the Seventh Circuit. The absence of an economic motive is no longer a proper basis for rejecting a civil RICO claim. Additionally, although in its RICO decisions immediately preceding *Scheidler*—*Reves*⁸⁶ and *Holmes*⁸⁷ — the Court narrowed RICO's scope, *Scheidler* demonstrates that the Court remains unwilling to adopt judicially-created limitations on the scope of RICO if the limitations are not supported by RICO's broadly worded text.⁸⁸

80. *See id.* at 806 n.6

81. *Id.* at 806-07.

82. *Id.* at 807.

83. *Id.*

84. *Id.*

85. *Id.*

86. 113 S. Ct. 1163 (discussed *supra* text accompanying notes 7-27).

87. 112 S. Ct. 1311 (discussed *supra* text accompanying notes 30-50).

88. *See, e.g.,* H.J. Inc. v. Northwestern Bell Tel. Co., 492 U.S. 229, 243-49 (1989) (Court refuses to read an "organized crime" limitation into RICO); *see also* Michael Goldsmith, *Judicial Immunity for White-Collar Crime: The Demise of Civil RICO*, 30 HARV. J. ON LEGIS. 1, 8-18 (1993) (providing an overview of Supreme Court RICO jurisprudence).

II. RECENT SEVENTH CIRCUIT DEVELOPMENTS

Recently, the Seventh Circuit has addressed a variety of civil RICO issues. First, the Seventh Circuit has finally adopted a rule for determining when a civil RICO claim accrues for purposes of applying RICO's limitations period. Second, the Seventh Circuit has continued to refine its method of applying RICO's elusive pattern of racketeering activity requirement. Lastly, the Seventh Circuit has determined what is necessary for standing to bring a claim based on RICO's prohibition against conspiracies to violate RICO. Each of these developments is addressed in turn.

A. *Accrual of a Civil RICO Claim*

In *Agency Holding Corp. v. Malley-Duff & Assoc., Inc.*, the Supreme Court held that a four-year limitations period applies to civil RICO actions.⁸⁹ However, the Court refused to decide when a RICO action accrues for purposes of starting the limitations period.⁹⁰ After the Court's decision in *Agency Holding Corp.*, the federal courts developed a variety of RICO accrual rules.⁹¹

In *McCool v. Strata Oil Co.*,⁹² the Seventh Circuit articulated its RICO accrual rules. Before *McCool*, precisely when a civil RICO action accrued was an issue that produced conflicting decisions among the district courts within the Seventh Circuit.⁹³ Prior to the Seventh Circuit addressing the issue in *McCool*, at least four RICO accrual rules had been established among the federal courts: (1) the discovery rule, which provides that a claim accrues when the claimant first knows or should have known of an injury which forms the basis for a RICO action;⁹⁴ (2) the separate accrual discovery rule, a variation of the discovery rule which provides a fresh four-year limitations period for each new injury, but allows recovery only for injuries that were discovered or that should have been discovered within the limitations period;⁹⁵ (3) the last predicate act rule, which provides that RICO's limitations period begins to run after the last predicate act and allows recovery for injuries caused by all acts that are part of the same pattern of racketeering acts;⁹⁶ and (4) the last predicate act discovery rule, under

89. 483 U.S. 143, 156 (1987).

90. *Id.* at 157.

91. See Mary S. Humes, Note, *RICO and a Uniform Rule of Accrual*, 99 YALE L.J. 1399, 1409-1417 (1990) (discussing the various RICO accrual rules developed by the federal courts); Paul B. O'Neill, Note, "*Mother of Mercy, Is this the Beginning of RICO?*": *The Proper Point of Accrual of a Private Civil RICO Action*, 65 N.Y.U. L. REV. 172, 195-234 (1990) (same).

92. 972 F.2d 1452 (7th Cir. 1992).

93. See, e.g., *Calabrese v. State Farm Mut. Auto. Ins. Co.*, 789 F. Supp. 264, 266-68 (N.D. Ill. 1992) (applying a discovery accrual rule); *Norris v. Wirtz*, 703 F. Supp. 1322, 1326 (N.D. Ill. 1989) (applying a last predicate act accrual rule).

94. Humes, *supra* note 91, at 1409-10.

95. *Id.* at 1411-13.

96. *Id.* at 1413-14.

which the limitations period does not run until the claimant discovers or should have discovered the last predicate act which is part of the alleged pattern of racketeering activity.⁹⁷

In *McCool*, investors who put their money in an oil drilling project in 1984 brought securities fraud and civil RICO claims in 1989.⁹⁸ The district court held that the RICO claims were time-barred by RICO's four-year limitations period and granted summary judgment.⁹⁹ On appeal, the *McCool* court began its analysis of the RICO accrual issue by noting that a four-year statute of limitations period applies to civil RICO claims, and by noting that federal equitable tolling principles apply to civil RICO claims.¹⁰⁰ The court rejected the "last predicate act" rule, which had been applied by some district courts in the Seventh Circuit.¹⁰¹ The court found the last predicate act rule problematic because it allows a "plaintiff to recover for every injury suffered as a result of [a RICO violation], no matter how old."¹⁰²

The *McCool* court opted for a discovery-based accrual rule.¹⁰³ Yet the Seventh Circuit's discovery rule differs from those adopted in other circuits. The Seventh Circuit requires only discovery of an injury and not also discovery of the presence of a RICO pattern.¹⁰⁴ Acknowledging that there must be a pattern of racketeering before the statute of limitations begins to run on a RICO claim, the Seventh Circuit recognized a distinction between discovering an injury and discovering a cause of action on which to base a theory of recovery, and held that a pattern of racketeering merely establishes a RICO cause of action, not the existence of an actionable injury.¹⁰⁵ The court did state, however, that application of equitable tolling principles might allow for tolling the limitations period during the time that a diligent plaintiff investigates the existence of a pattern of racketeering.¹⁰⁶

Additionally, the *McCool* court incorporated a separate accrual principal into its discovery rule. As discussed above, a separate accrual discovery rule specifies that a new RICO claim arises for each injury. The court compared the operation of its separate accrual discovery rule to an adage of playground basketball — "no blood, no foul."¹⁰⁷ According to the Seventh Circuit, "each

97. *Id.* at 1415-16.

98. *McCool*, 972 F.2d at 1454.

99. *See McCool v. Strata Oil Co.*, 724 F. Supp. 1232 (N.D. Ill. 1989), *aff'd in part, rev'd in part*, 972 F.2d 1452 (7th Cir. 1992).

100. *McCool*, 972 F.2d at 1463.

101. *See, e.g., Norris v. Wirtz*, 703 F. Supp. 1322 (N.D. Ill. 1989).

102. *McCool*, 972 F.2d at 1464.

103. *Id.* at 1464-65.

104. *Id.* at 1465.

105. *Id.*

106. *Id.*

107. *Id.* at 1466.

wrongful act that causes injury is a new cause of action.”¹⁰⁸ In light of the established rule that RICO injuries flow from the predicate racketeering acts, rather than the pattern of racketeering activity, the court rejected more generous accrual rules which allow recovery of all injuries caused by a pattern of racketeering activities even if some injuries occurred outside of the limitations period.¹⁰⁹

After resolving the issue of when a RICO claim accrues, the Seventh Circuit found that because of a dispute in the evidence it could not decide whether its accrual rule barred the civil RICO claims in *McCool* (the case was before the court to review a grant of summary judgment), and the case was remanded. Since the Seventh Circuit’s decision in *McCool*, the accrual rule has been accepted by another Seventh Circuit panel and applied by some district courts within the Seventh Circuit.¹¹⁰

The Seventh Circuit was one of the last circuits to adopt a RICO accrual rule. *McCool* resolves the dispute among the district courts in the Seventh Circuit, but joins cases from other circuits in producing a cacophony of RICO accrual approaches. Although the conflict among the circuits could prompt the Supreme Court to address the issue in the near future, until the Supreme Court resolves the conflict *McCool* makes the Seventh Circuit one of the least advantageous circuits for bringing RICO claims. Other circuits apply RICO accrual rules which are more generous with respect to what a claimant must discover before the limitations period begins to run.¹¹¹ Additionally, other circuits are more generous with respect to what injuries a claimant may obtain recovery for by allowing either recent injuries or recent racketeering acts to start a new limitations period for all injuries stemming from the same pattern of racketeering activity.¹¹²

B. Pattern Requirement

To prevail on a civil RICO claim, a claimant must allege and prove, among other things, a “pattern of racketeering activity.”¹¹³ RICO provides that a

108. *Id.*

109. *Id.* (citing *Sedima S.P.R.L. v. Imrex Co.*, 473 U.S. 479, 495-97 (1985)).

110. See *Bontkowski v. First Nat’l Bank of Cicero*, 998 F.2d 459, 461-62 (7th Cir.), *cert. denied*, 114 S. Ct. 602 (1993); *Pucci v. Litwin*, 828 F. Supp. 1285, 1296-97 (N.D. Ill. 1993); *Jacobsohn v. Marks*, 818 F. Supp. 1187, 1189-91 (N.D. Ill. 1993); *In re VMS Ltd. Partnership Sec. Litig.*, 803 F. Supp. 179, 188-91 (N.D. Ill. 1992).

111. See, e.g., *Granite Falls Bank v. Henrikson*, 924 F.2d 150, 154 (8th Cir. 1991) (plaintiff must discover both injury and RICO pattern before limitations period begins to run).

112. See, e.g., *Keystone Ins. Co. v. Houghton*, 863 F.2d 1125, 1130-31 (3rd Cir. 1988) (“If the complaint was filed within four years of the last injury or the last predicate act, the plaintiff may recover for injuries caused by other predicate acts which occurred outside an earlier limitations period but which are part of the same ‘pattern.’”).

113. See *Sedima S.P.R.L. v. Imrex Co.*, 473 U.S. 479, 496 (1985) (“A violation of [RICO] . . . requires (1) conduct (2) of an enterprise (3) through a pattern (4) of racketeering activity.”).

pattern of racketeering activity requires at least two such predicate acts,¹¹⁴ committed within a ten-year period, excluding any period of imprisonment.¹¹⁵ The Supreme Court has discussed the contours of RICO's pattern requirement twice.¹¹⁶ In *Sedima, S.P.R.L. v. Imrex Co.*, the Supreme Court instructed that because RICO provides only that two predicate acts are *required* for a pattern, "while two acts are necessary, they may not be sufficient."¹¹⁷ After reviewing RICO's legislative history, the Court in *Sedima* determined that "[i]t is the factor of *continuity plus relationship* which combines to produce a pattern."¹¹⁸ After *Sedima*, the federal courts developed a number of different methods for determining whether a RICO pattern exists, and created a conflict among the circuits.¹¹⁹ To resolve the circuit conflict, the Court provided further guidance in *H.J. Inc. v. Northwestern Bell Telephone Co.*¹²⁰ In *H.J. Inc.*, the Court attempted to define the relationship and continuity prongs of its continuity plus relationship requirement. To define the relationship prong the Court adopted the definition of pattern of criminal conduct provided in 18 U.S.C. § 3575(e): "[predicates that have] the same or similar purposes, results, participants, victims, or methods of commission, or otherwise are interrelated by distinguishing characteristics and are not isolated events."¹²¹ With respect to the continuity prong, the Court said that continuity is "both a closed- and open-ended concept, referring either to a closed period of repeated conduct, or to past conduct that by its nature projects into the future with a threat of repetition."¹²² The Court stressed that in either case, continuity is "*centrally a temporal concept*."¹²³ Closed-ended continuity may be demonstrated "by proving a series of related predicates extending over a substantial period of time."¹²⁴ Although the Court did not define precisely what constitutes a substantial period of time, it did

114. A racketeering activity is any one of the various state and federal offenses identified at 18 U.S.C. § 1961(1). One court has described the list of offenses in § 1961(1) as "a bewildering array of offenses from kidnapping to embezzlement, from murder to fraud." *McCool*, 972 F.2d at 1466.

115. 18 U.S.C. § 1961(5) provides:

[A] "pattern of racketeering activity" requires at least two acts of racketeering activity, one of which occurred after the effective date of this chapter and the last of which occurred within ten years (excluding any period of imprisonment) after the commission of a prior act of racketeering activity.

116. See *H.J. Inc. v. Northwestern Bell Telephone Co.*, 492 U.S. 229 (1989); *Sedima S.P.R.L. v. Imrex Co.*, 473 U.S. 479 (1985).

117. 473 U.S. at 496 n.14.

118. *Id.* (emphasis in original).

119. See, e.g., Bart A. Karwath, Note, *Has the Constituency of Continuity Plus Relationship Put an End to RICO's Pattern of Confusion?*, 18 AM. J. CRIM. L. 201, 203 & n.17 (1991) (and materials cited therein).

120. 492 U.S. 229, 235 (1989).

121. *Id.* at 240.

122. *Id.* at 241.

123. *Id.* at 242 (emphasis added).

124. *Id.*

determine that continuity is not present if the racketeering activity lasts only a few weeks or months and threatens no future criminal conduct.¹²⁵ If a RICO action is brought before closed-ended continuity can be proven, continuity may be established by proving open-ended continuity.¹²⁶ The Court declined to provide an exhaustive set of circumstances that present open-ended continuity, but offered some examples of situations that it believed demonstrate the threat of future criminal conduct, including the example of a defendant engaging in racketeering activity as a regular way of doing business.¹²⁷

In response to *Sedima*, the Seventh Circuit created a multi-factor continuity standard in *Morgan v. Bank of Waukegan*.¹²⁸ In *Morgan*, the Seventh Circuit determined that the relevant factors for assessing continuity “include the number and variety of predicate acts and the length of time over which they were committed, the number of victims, the presence of separate schemes and the occurrence of distinct injuries.”¹²⁹ The court described RICO’s requirement of a pattern of racketeering activity as a “standard, not a rule,”¹³⁰ and explained that determining whether continuity is present is necessarily dependant upon the facts and circumstances of each case.¹³¹ Accordingly, the court warned that in applying the multi-factor standard, no one factor should necessarily be determinative.¹³²

After the Supreme Court provided additional guidance on RICO’s pattern requirement in *H.J. Inc.*, the Seventh Circuit had to decide whether it would continue applying the same *Morgan* multi-factor continuity standard.¹³³ In *Sutherland v. O’Malley*, the Seventh Circuit noted that, notwithstanding the refinement of the continuity concept in *H.J. Inc.*, the Supreme Court “ha[d] not formulated any general test for continuity in the abstract.”¹³⁴ Therefore, the court, applying the *Morgan* multi-factor standard, determined that an examination of the specific facts in each case remained necessary to properly assess the presence of continuity.¹³⁵

In *Management Computer Services, Inc. v. Hawkins, Ash, Baptie & Co.*, a case decided only days after *Sutherland*, the Seventh Circuit stated that, although in *H.J. Inc.* the Court “attempted to provide additional guidance” on RICO’s pattern requirement, the Court’s “explanations of the terms continuity plus

125. *Id.*

126. *Id.*

127. *Id.* at 242-43.

128. 804 F.2d 970 (7th Cir. 1986).

129. *Id.* at 975.

130. *Id.* at 976.

131. *Id.*

132. *Id.*

133. See Karwath, *supra* note 119, at 230-32.

134. 882 F.2d 1196, 1204 (7th Cir. 1989).

135. *Id.*

relationship [were] somewhat elastic.”¹³⁶ Noting that *H.J. Inc.* prescribed “a natural and common sense approach to RICO’s pattern element,” the court in *Hawkins* determined that “the factors identified in *Morgan*—with the exception of our focus on the presence of separate schemes—are still useful in analyzing the pattern.”¹³⁷

The decisions in *Sutherland* and *Hawkins* indicate that initially the Seventh Circuit believed that it should continue applying the same *Morgan* multi-factor continuity standard. Apparently there was concern over only the weight to be given the presence of separate schemes.

In *New Burnham Prairie Homes, Inc. v. Village of Burnham*, the Seventh Circuit appeared to resolve the question of what effect *H.J. Inc.* would have on its use of the *Morgan* multi-factor continuity standard.¹³⁸ In *New Burnham*, the court determined that the continuity concept articulated in *H.J. Inc.* “confirm[ed] the well-established precedent of this circuit,” and determined that the following factors should be considered in assessing continuity: “(1) the number and variety of predicate acts and the length of time over which they were committed; (2) the number of victims; (3) the presence of separate schemes; and (4) the occurrence of distinct injuries.”¹³⁹ The most significant statement in *New Burnham* was that *H.J. Inc.*’s refinement of the continuity concept had no impact on how the Seventh Circuit applies its multi-factor continuity standard. According to the court in *New Burnham*, the rule that when applying the multi-factor continuity standard “[n]o one factor is dispositive of a claim,” survived *H.J. Inc.*’s refinement.¹⁴⁰

Although *New Burnham* indicated that the Seventh Circuit was firmly committed to continuing to apply its *Morgan* multi-factor standard in the same fashion as before *H.J. Inc.*, two recent Seventh Circuit cases reveal that the Seventh Circuit has altered how it employs the *Morgan* factors. These cases demonstrate that the Seventh Circuit’s continuity standard has evolved from the traditional *Morgan* multi-factor approach to a time-focused criterion.

The first clear indication that the Seventh Circuit was modifying its continuity standard came in *Midwest Grinding Co. v. Spitz*.¹⁴¹ In *Spitz*, the court began its continuity analysis by reviewing *H.J. Inc.*’s closed- and open-ended continuity concepts.¹⁴² According to the court’s understanding of those concepts, “a RICO plaintiff can prevail by either (1) demonstrating a closed-ended conspiracy that existed for such an extended period of time that a threat of future harm is implicit, or (2) an open-ended conspiracy that, while short-

136. 883 F.2d 48, 50-51 (7th Cir. 1989).

137. *Id.* at 50.

138. 910 F.2d 1474 (7th Cir. 1990).

139. *Id.* at 1478.

140. *Id.*

141. 976 F.2d 1016 (7th Cir. 1992).

142. *Id.* at 1022-23.

lived, shows clear signs of threatening to continue into the future.”¹⁴³ The court also stated that the impact of *H.J. Inc.* was a “refocusing [of] the pattern requirement on the sort of long-term criminal activity that carries some quantum of threat to society.”¹⁴⁴ The court held that the racketeering activity present in *Spitz* was closed-ended, and concluded that whether continuity could be found hinged on whether the activity extended over a substantial period of time.¹⁴⁵ Although the court stated that it would be *aided* by the *Morgan* multi-factor standard in determining if the time span of the racketeering activity was substantial, it acknowledged that the duration of the racketeering activity, “is perhaps the closest thing . . . to a bright-line continuity test.”¹⁴⁶ Because the racketeering activity was a “one shot scheme that lasted, at most, nine months,” and because none of the remaining *Morgan* factors supported finding continuity, a RICO pattern was not found.¹⁴⁷

The continuity discussion in *Midwest Grinding* demonstrates that, contrary to the analysis provided in *New Burnham*, the Seventh Circuit now believes that *H.J. Inc.* requires a modification of the *Morgan* multi-factor continuity standard. Specifically, the court noted that one of the *Morgan* factors—duration of the racketeering activity—is the primary consideration for courts when performing a continuity inquiry, and described the role of the remaining *Morgan* factors as merely aiding the court in evaluating whether the duration of the racketeering activity constitutes a substantial period of time.

In *420 East Ohio Limited Partnership v. Cocose*, the Seventh Circuit discussed *H.J. Inc.*’s refinement of the continuity requirement and observed that since *H.J. Inc.* the Seventh Circuit had retained the *Morgan* multi-factor continuity standard.¹⁴⁸ However, the court also acknowledged that since *H.J. Inc.* the Seventh Circuit had “changed slightly” the way the court utilized the *Morgan* multi-factor continuity standard.¹⁴⁹ According to the court in *Cocose*, after *H.J. Inc.* the Seventh Circuit examines “the facts with an eye toward not only the *Morgan* factors, but also toward the Court’s suggestion that continuity encompasses a lengthy period of racketeering activity or a threat of continued criminal activity.”¹⁵⁰ The court in *Cocose* applied a modified *Morgan* standard, and determined that closed-ended continuity could not be found because the alleged single scheme of racketeering activity occurred over a six-month period and therefore the racketeering activity did not take place over a substantial period of time.¹⁵¹ Significantly, the court stated, “[t]his does not mean [that] a six-

143. *Id.* at 1023.

144. *Id.* at 1025.

145. *Id.*

146. *Id.* at 1024.

147. *Id.* at 1024-25.

148. 980 F.2d 1122, 1124 (7th Cir. 1992).

149. *Id.*

150. *Id.*

151. *Id.* at 1124-25.

month period is automatically 'too short'; however, six months is not enough to automatically infer the requisite continuity."¹⁵² The court also concluded that there was no indication that the alleged racketeering activity presented the threat of future criminal activity.

In *Cocose*, the Seventh Circuit explicitly took notice of the *H.J. Inc.*-influenced evolution of its continuity standard. Additionally, the Seventh Circuit's discussion in *Cocose* hinted that given the proper time span of racketeering activity, the Seventh Circuit may be willing to find continuity based solely on the duration of the racketeering activities.

The Seventh Circuit no longer follows its prior rule that no one of the *Morgan* factors can control the outcome of a continuity inquiry, and has begun focusing on the duration of the racketeering activity. However, it is unclear what effect this modification in the Seventh Circuit's continuity standard will have on the precedential value of its pre-*H.J. Inc.* cases. More importantly, by employing a time-focused continuity criterion in the post-*H.J. Inc.* era, the Seventh Circuit's continuity analyses will be more similar to the continuity analyses performed by other circuit courts.¹⁵³ The use of a time-focused continuity criterion promotes uniform development among the federal courts of *H.J. Inc.*'s RICO pattern requirement. Uniform development of the continuity requirement is necessary because, as the Supreme Court explained in *H.J. Inc.*, in the absence of a legislative amendment of RICO's pattern requirement, further refinement of the closed- and open-ended continuity concepts must come through application by the federal courts.¹⁵⁴

C. Standing for Civil RICO Conspiracy Claims

In *Schiffels v. Kemper Financial Services, Inc.*,¹⁵⁵ the Seventh Circuit addressed RICO's standing requirement for civil RICO claims based on a

152. *Id.* at 1125.

153. See, e.g., *Primary Care Investors, Seven, Inc. v. PHP Healthcare Corp.*, 986 F.2d 1208, 1215-16 (8th Cir. 1993); *Religious Technology Ctr. v. Wollershiem*, 971 F.2d 364, 366-67 (9th Cir. 1992); *Aldridge v. Lily-Tulip, Inc.*, 953 F.2d 587, 592-94 (11th Cir. 1992); *Lange v. Hocker*, 940 F.2d 359, 361-62 (8th Cir. 1991); *Hughes v. Consol-Pennsylvania Coal Co.*, 945 F.2d 594, 609-611 (3rd Cir. 1991), *cert. denied*, 112 S. Ct. 2300 (1992); *American Eagle Credit Corp. v. Gaskins*, 920 F.2d 352, 354-55 (6th Cir. 1990).

154. The Court stated:

The limits of the relationship and continuity concepts that combine to define a RICO pattern, and the precise methods by which relatedness and continuity or its threat may be proved, cannot be fixed in advance with such clarity that it will always be apparent whether in a particular case a "pattern of racketeering activity" exists. The development of these concepts must await future cases, absent a decision by Congress . . . to provide [clearer] guidance as to [RICO's] intended scope.

H.J. Inc., 492 U.S. at 243.

155. 978 F.2d 344, 348-351 (7th Cir. 1992).

violation of RICO's prohibition of conspiracies to violate RICO.¹⁵⁶ Presently, a conflict over RICO's standing requirement for conspiracy claims exists among the federal courts; some courts require a claimant to allege an injury caused by a RICO predicate act of racketeering activity, and some courts require only that a claimant allege an injury caused by any act taken in furtherance of a RICO conspiracy.¹⁵⁷ The only case from the Seventh Circuit touching the subject, *Rylewicz v. Beaton Services, Ltd.*,¹⁵⁸ suggested that the more stringent standing requirement, which requires an allegation of an injury caused by a RICO predicate, would be applied in the Seventh Circuit.

In *Schiffels*, a discharged employee brought a civil RICO action alleging an injury caused by an act in furtherance of a conspiracy to violate RICO. Specifically, the employee alleged that she was harassed and eventually fired—acts which do not constitute RICO predicates—as part of the defendants' conspiracy. The Seventh Circuit held that, contrary to the suggestion in *Rylewicz*, standing to bring a RICO conspiracy claim requires only an injury caused by an act in furtherance of a RICO conspiracy.¹⁵⁹ In reaching this conclusion, the court in *Schiffels* was guided by RICO's statutory language, which provides a civil cause of action to "any person injured in his business or property by reason of a violation of [RICO],"¹⁶⁰ and the Seventh Circuit's established rule that RICO conspiracy law is controlled by "traditional concepts of conspiracy law," which require only an agreement and an act in furtherance of the agreement in order to have an actionable conspiracy.¹⁶¹

156. See 18 U.S.C. § 1964(d).

157. See *Bowman v. Western Auto Supply Co.*, 985 F.2d 383, 388 (8th Cir.) (holding that standing to bring a RICO conspiracy claim requires evidence that claimant was harmed by a RICO predicate committed in furtherance of a conspiracy to violate RICO), *cert. denied*, 113 S. Ct. 2459 (1993); *Miranda v. Ponce Fed. Bank*, 948 F.2d 41, 48 (1st Cir. 1991) ("an actionable claim under § 1962(d) . . . requires that the complainant's injury stem from a predicate act within the purview of 18 U.S.C. § 1961(1)."); *Reddy v. Litton Indus., Inc.*, 912 F.2d 291, 294-95 (9th Cir. 1990) (discussing the conflict and deciding that a civil RICO claimant must allege an injury caused by a RICO predicate), *cert. denied*, 112 S. Ct. 332 (1991); *Hecht v. Commerce Clearing House, Inc.*, 897 F.2d 21, 25 (2d Cir. 1990) ("[S]tanding may be founded only upon injury from overt acts that are also section 1961 predicate acts, and not upon any and all overt acts furthering a RICO conspiracy."); *Shearin v. E.F. Hutton Group, Inc.*, 885 F.2d 1162, 1168-170 (3rd Cir. 1989) (holding that standing for a RICO conspiracy claim does not require an allegation of an injury caused by a RICO predicate); see also *Reddy v. Litton Indus., Inc.*, 112 S. Ct. 332 (1991) (White, J., dissenting from decision to deny certiorari in light of the circuit conflict); Fredric Brooks, *RICO Conspiracy Standing After Sedima*, 25 COLUM. J.L. & SOC. PROBS. 423 (1992) (discussing the conflict and advocating adoption of a standing rule which requires only an injury caused by any act in furtherance of a RICO conspiracy).

158. 888 F.2d 1175 (7th Cir. 1989).

159. *Schiffels*, 978 F.2d at 351.

160. 18 U.S.C. § 1964(c).

161. *Schiffels*, 978 F.2d at 348 (citing *United States v. Neapolitan*, 791 F.2d 489 (7th Cir.), *cert. denied*, 479 U.S. 940 (1986)).

The Seventh Circuit rejected the argument that the Supreme Court's decision in *Sedima S.P.R.L. V. Imrex Co.*¹⁶² requires an injury caused by a RICO predicate act for all civil RICO claims, including RICO conspiracy claims.¹⁶³ According to the court in *Schiffels*, the Supreme Court's decision in *Sedima* addressed only the standing requirement for substantive RICO violations, and not RICO conspiracy claims.¹⁶⁴ The Seventh Circuit also rejected the argument that the more stringent standing rule should be applied in order to restrict the scope of RICO.¹⁶⁵ According to the court, such a restrictive application of RICO would be contrary the Supreme Court's directive in *Sedima* that "RICO is to be read broadly" in light of RICO's broad language and its liberal construction clause.¹⁶⁶ To the extent that the Seventh Circuit's decision in *Schiffels* conflicts with its prior decision in *Rylewicz*, the court in *Schiffels* held that *Rylewicz* is rejected.¹⁶⁷

162. 473 U.S. 479 (1985).

163. *Schiffels*, 978 F.2d at 349.

164. *Id.*

165. *Id.* at 350.

166. *Id.* (quoting *Sedima*, 473 U.S. at 497-98).

167. *Id.* at 351.

SURVEY OF RECENT DEVELOPMENTS IN INSURANCE LAW

JOHN C. TRIMBLE*

RICHARD K. SHOULTZ**

INTRODUCTION

During this survey period,¹ the Indiana Supreme Court acted to “giveth and taketh away” substantive rights in the insurance industry. The court ushered in the survey period with *Miller Brewing Co. v. Best Beers*,² by refusing to permit a party³ to seek punitive damages from a defendant⁴ who breached a contract.⁵ Only a few months later, with its decision in *Erie Insurance Co. v. Hickman*,⁶ the Indiana high court showed that it also could “taketh away” substantive rights.

Although Indiana courts rendered many other insurance decisions during the survey period,⁷ this Article’s main focus is the probable effect of the Indiana Supreme Court’s ruling in *Hickman*. This Article will also address notable decisions in the following areas: “intentional acts” exclusions; health and life insurance; automobile coverage; and uninsured/underinsured motorist coverage.

* Partner, Lewis & Wagner. B.A., 1977, Hanover College; J.D., 1981, Indiana University School of Law—Indianapolis.

** Associate, Lewis & Wagner. B.A., 1987, Hanover College; J.D., 1990, Indiana University School of Law—Indianapolis.

1. The survey period for this issue is approximately September 1, 1992 to October 31, 1993.

2. 608 N.E.2d 975 (Ind. 1993).

3. In this context, “party” also refers to the insured in an insurance contract.

4. “Defendant” includes an insurance company.

5. See Judy L. Woods & Brad A. Galbraith, *Recent Developments in Contract and Commercial Law*, 27 IND. L. REV. 769 (1994).

6. 622 N.E.2d 515 (Ind. 1993).

7. Practitioners may wish to review many of the other notable insurance law decisions from the survey period. See, e.g., *Sullivan v. American Casualty Co.*, 605 N.E.2d 134 (Ind. 1992) (defensive use of collateral estoppel in uninsured motorist litigation); *West Am. Ins. Co. v. Mid-American Fire & Casualty Co.*, 611 N.E.2d 646 (Ind. Ct. App. 1993) (whether an auto policy covered a newly purchased automobile); *Bailey v. Shelter Mut. Ins. Co.*, 615 N.E.2d 508 (Ind. Ct. App. 1993) (whether wife who was listed as an insured was entitled to fire insurance proceeds when court eliminated wife’s interest in property by divorce); *Frankenmugh Mut. Ins. Co. v. Williams*, 615 N.E.2d 462 (Ind. Ct. App. 1993) (insurer not responsible for insured’s judgment absent notice); *Daniels v. Cincinnati Ins. Co.*, 800 F. Supp. 753 (S.D. Ind. 1992) (addressing whether liability policy covered insured CEO for personal liability on hazardous chemical claim); *Lift-A-Loft Corp. v. Rodes-Roper-Love Ins. Agency, Inc.*, 975 F.2d 1305 (7th Cir. 1992) (statute of limitations on breach of contract claim against insurance agency); *Baylor Heating & Air Conditioning, Inc. v. Federated Mut. Ins. Co.*, 987 F.2d 415 (7th Cir. 1993) (definition of “occurrence” under comprehensive general liability policy); *United Farm Bureau Mut. Ins. Co. v. Schult*, 602 N.E.2d 173 (Ind. Ct. App. 1992) (addressing liability interests in partnership); *American Economy Ins. Co. v. Motorists Mut. Ins. Co.*, 605 N.E.2d 162 (Ind. 1992) (addressing policy language for the reduction of underinsured motorists benefits based on amounts received from underinsured motorist).

I. ACTION FOR INSURER'S TORTIOUS BREACH OF A DUTY OF GOOD FAITH

Although not a case specifically dealing with insurance, the Indiana Supreme Court's decision in *Miller Brewing Co. v. Best Beers*⁸ made a significant contribution to the field of insurance law. In *Miller*, a beer distributor sought consequential and punitive damages from a beer brewer for the brewer's alleged breach of a distributorship agreement.⁹ One of the issues raised in the appeal was whether the distributor was entitled to seek punitive damages for the brewer's breach of the contract.

The Indiana Supreme Court first reiterated Indiana's general rule that a plaintiff cannot recover punitive damages in a breach of contract action.¹⁰ It also observed that Indiana courts seemed to suggest that there were exceptions to this general rule,¹¹ referring to *Vernon Fire & Casualty v. Sharp*.¹² In *Sharp*, an insured sought punitive damages from two insurers after they failed to indemnify the insured for a covered fire loss.¹³ The insurers refused to pay for losses that the policy unquestionably covered until the parties resolved a separate disputed coverage claim.¹⁴ Although the *Sharp* court recognized Indiana's rule against the recovery of punitive damages in a breach of contract case, it found that the insured successfully had established that the insurers engaged in "intentional and wanton" tortious conduct.¹⁵ Consequently, the court upheld the insured's judgment for punitive damages.¹⁶

Although the *Sharp* court ruled that the insured was entitled to punitive damages by showing that the insurers committed an independent tort, the court also mentioned that a plaintiff may recover punitive damages in a breach of contract case without establishing that the defendant committed an independent tort:

8. 608 N.E.2d 975 (Ind. 1993).

9. *Id.* at 978.

10. *Id.* at 981 (citing *inter alia* *Lawyers Title Ins. Corp. v. Pokvaka*, 595 N.E.2d 244, 250 (Ind. 1992)); *Bud Wolf Chevrolet, Inc. v. Robertson*, 519 N.E.2d 135, 136 (Ind. 1988); *Travelers Indem. Co. v. Armstrong*, 442 N.E.2d 349, 362 (Ind. 1982)).

11. *Id.*

12. 349 N.E.2d 173 (Ind. 1976).

13. The specific paragraphs from the insured's complaint for punitive damages provided:
[2.] That said defendants have wrongfully breached said contracts of insurance and refuse to pay for the loss sustained by the plaintiff, and that said defendants have been guilty of bad faith in dealing with their insured, this plaintiff.
[3.] That the said defendants have acted in an intentional and wanton manner in dealing with their insured, this plaintiff, and as a result thereof they have refused to pay this plaintiff the proceeds of said insurance.

Id. at 179.

14. *Id.* at 181-83.

15. *Id.* at 184.

16. *Id.* at 185.

Neither of [the reasons for the requirement of a plaintiff establishing an independent tort by the defendant] is very compelling when it appears from the evidence as a whole that a serious wrong, tortious in nature, has been committed, but the wrong does not conveniently fit the confines of a pre-determined tort. . . .¹⁷

In subsequent decisions, courts have referred to this language when permitting a plaintiff to recover punitive damages in breach of contract cases without having first established an independent tort.¹⁸

The *Miller* court, finding that the above-cited language in *Sharp* was *dicta*,¹⁹ instead held:

[i]n order to recover punitive damages in a lawsuit founded upon a breach of contract, the plaintiff must plead and prove the existence of an independent tort of the kind for which Indiana law recognizes that punitive damages may be awarded.²⁰

With the *Miller* decision, the court reaffirmed part of the *Sharp* language, which recognized that Indiana law requires an insured to plead and prove an independent tort before the insured may seek punitive damages for alleged bad faith.²¹ Additionally, the *Miller* court established that there are no exceptions to this rule by eliminating the confusing *dicta* of *Sharp*, in which the court stated that a plaintiff does not always need to establish an independent tort before he or she may recover punitive damages in a breach of contract case.²² However, *Miller*'s significance to the insurance industry was short-lived.

Later in the year, the Indiana Supreme Court judicially created the first exception to the general rule pronounced in *Miller*. The *Erie Insurance Co. v. Hickman*²³ decision will significantly impact attorneys representing both insureds and insurance companies. In *Hickman*, the Indiana Supreme Court recognized "a cause of action for the tortious breach of an insurer's duty to deal

17. *Id.* at 180.

18. *Miller*, 608 N.E.2d at 982.

19. Specifically, the *Miller* court stated:

[W]e conclude that the language in *Vernon Fire* was *dicta* when it suggested that punitive damages are available in contract actions even if the plaintiff does not also establish each element of a recognized tort for which Indiana law would permit the recovery of punitive damages.

Id. at 983.

20. *Id.* at 984.

21. *Id.*

22. See *supra* notes 17-19.

23. 622 N.E.2d 515 (Ind. 1993).

with its insured in good faith."²⁴ The court's recognition of this cause of action, created a new tort in the state of Indiana.²⁵

In *Hickman*, the insured obtained only liability and uninsured motorist coverages from the insurer.²⁶ The insured was involved in an automobile accident with another driver,²⁷ and then reported the accident to the insurer for uninsured motorist coverage. The insurer investigated the accident and concluded that the other driver was insured.²⁸

Early in the investigation, the insurer advised its insured to pursue her recovery against the other driver.²⁹ However, the insured later discovered that the other driver was uninsured and made a claim for uninsured motorist coverage with her insurer.³⁰ The insurer allowed a year to pass before confirming that the other driver was in fact uninsured.³¹ Finally, when the insurer finished its investigation, it determined that the insured was not entitled to uninsured motorist benefits because her comparative fault was greater than fifty percent.³²

In response to the insurer's refusal to proceed further,³³ the insured filed a lawsuit against the insurer and the other driver.³⁴ The insured sought to recover from the other driver for personal injuries and property damage.³⁵ The insured also sued the insurer for breach of the insurance contract, bad faith and punitive damages for failing to pay uninsured motorist benefits.³⁶

24. *Id.* at 519.

25. Although the beginning of the *Hickman* decision appears to assert that such a tort remedy already existed in Indiana ("We grant transfer to reaffirm the existence of a duty that an insurer deal in good faith with its insured, . . .") *Id.* at 517, the court actually recognized this tort for the first time. *Id.* at 519.

26. *Id.* at 521.

27. *Id.*

28. *Id.*

29. *Id.*

30. *Id.*

31. *Id.*

32. *Id.* at 522. The insurance policy provided that the insurer agreed to pay only the amount of damages that the insured would be entitled to recover from the uninsured motorist. *Id.* at 521. Therefore, if the insured's comparative fault was greater than fifty percent, the insured would not be entitled to recover from the insurer under the uninsured motorist coverage. *Id.* See also IND. CODE. ANN. §§ 34-4-33-1 to -12 (West Supp. 1993).

33. *Id.* at 522. The insured demanded arbitration under the policy and named an arbitrator. However, the insurer failed to name its arbitrator. *Id.*

34. *Id.*

35. *Id.* The insured obtained a default judgment against the other driver. *Id.*

36. *Id.*

At trial, the jury returned a verdict for the insured, awarding both compensatory and punitive damages.³⁷ The insurer appealed the punitive damage award after the Indiana Supreme Court granted transfer and remanded the case on another issue.³⁸

Although acknowledging the impact of *Miller*, the *Hickman* court ruled that an exception should exist in the relationship between the insured and the insurer.³⁹ In creating an exception, the court recognized an implied legal duty on the part of the insurer to deal in good faith with its insured in every insurance contract.⁴⁰ The “special relationship” between the insured and the insurer justifies recognizing a cause of action violating that duty.⁴¹

The *Hickman* court also discussed the application of punitive damages in situations where the insured possesses a tort action for “bad faith” by the insurer. The court noted that even if the insured succeeds in establishing that the insurer breached his duty of good faith, the insured is not automatically entitled to punitive damages.⁴² Instead, the existing standard for recovery of punitive damages remains.⁴³ Punitive damages are recoverable only if an insured demonstrates, by clear and convincing evidence, that the insurer

acted with malice, fraud, gross negligence, or oppressiveness which was not the result of a mistake of fact or law, honest error or judgment, overzealousness, mere negligence, or other human failing, in the sum [that the jury believes] will serve to punish the defendant and to deter it and others from like conduct in the future.⁴⁴

37. *Id.* The court summarized the verdict as follows:

[The driver of the insured's car] was awarded compensatory damages in the amount of \$85.75 and punitive damages in the amount of \$1,000. [The insured] was awarded compensatory damages in the amount of \$2046.97 for the damages to her vehicle, the towing charge, the cost of temporary transportation, and interest she incurred on a loan she obtained to have her car repaired at her own expense, and punitive damages in the amount of \$10,000.

Id. at 522.

38. The Indiana Court of Appeals originally reversed the award of punitive damages. *Erie Ins. Co. v. Hickman*, 580 N.E.2d 320 (Ind. Ct. App. 1991). The Indiana Supreme Court then reversed the Court of Appeals' decision in *Erie Ins. Co. v. Hickman*, 605 N.E.2d 161 (Ind. 1992). Following remand, the Court of Appeals once again reversed the trial court's award of punitive damages because punitive damages are not recoverable in a breach of contract case. *Erie Ins. Co. v. Hickman*, 610 N.E.2d 283 (Ind. Ct. App. 1993).

39. 622 N.E.2d at 518.

40. *Id.*

41. *Id.* Although the court recognized the right of an insured to pursue a tort remedy for violation of bad faith by an insurer, the court also determined that the evidence presented at trial did not support the imposition of punitive damages against the insured. *Id.* at 520.

42. *Id.* at 520.

43. *Id.*

44. *Id.* (quoting *Bud Wolf Chevrolet, Inc. v. Robertson*, 519 N.E.2d 135, 137-38 (Ind.

The immediate impact of the *Hickman* decision is unclear without a definable standard for those actions by an insurer that will constitute "bad faith." The *Hickman* court readily admitted that no uniform definition existed in other jurisdictions that had recognized such an action.⁴⁵

An examination of the cases from other states reveals that the elements necessary to establish an insured's action for "bad faith" differ. In Alabama, one court stated "that an actionable tort arises for an insurer's intentional refusal to settle a direct claim where there is either (1) no lawful basis for the refusal coupled with actual knowledge of that fact or (2) intentional failure to determine whether or not there was any lawful basis for such refusal."⁴⁶ In Arizona, a court noted:

We recently clarified that tort recovery for bad faith is allowed if an insurer intentionally breaches the implied covenant of good faith and fair dealing in the insurance contract by denying the insured the security and protection from calamity that is the object of the insurance relationship. (citation omitted) To establish a prima facie case of bad faith, [the insured] had to prove that [the insurer] acted intentionally, not inadvertently or mistakenly, and that [the insurer] dealt unfairly or dishonestly with [the insured's] claim or failed to give fair and equal consideration to the [insured's] interests.⁴⁷

A California court described the standard by stating:

It is the obligation, deemed to be imposed by the law, under which the insurer must act *fairly and in good faith* in discharging its contractual responsibilities. Where in so doing, it fails to deal fairly and in good faith with its insured by refusing, without proper cause, to compensate its insured for a loss covered by the policy, such conduct may give rise to a cause of action in tort for breach of an implied covenant of good faith and fair dealing.⁴⁸

1988)).

45. The *Hickman* opinion states:

Although the majority of states recognize a cause of action in tort in the context of third-party claims and a lesser number for first party claims, . . . there is no uniform approach among individual states. Given the variety of ways in which tort claims for the failure of the insurer to exercise good faith may arise, (citation omitted), it is neither necessary nor prudent for us to fully define the parameters of the tort in this opinion.

Id. at 519, n.2.

46. *Chavers v. National Sec. Fire & Casualty Co.*, 405 So.2d 1, 7 (Ala. 1981).

47. *Hawkins v. Allstate Ins. Co.*, 733 P.2d 1073, 1079 (Ariz. 1987) *cert. denied* 484 U.S. 972 (1987).

48. *Gruenberg v. Aetna Ins. Co.*, 510 P.2d 1032, 1037 (Cal. 1973).

In addition to the possible uncertainty that the *Hickman* decision may bring, the necessity for this new tort seems questionable. The *Hickman* court failed to cite any perceived problem concerning "bad faith" by insurers; in fact, there are relatively few instances in which an insurer actively engages in "bad faith."⁴⁹

Indiana currently has statutory law intended to deter those actions by an insurer that might be considered "bad faith." Indiana's Unfair Claim Settlement Practices Act⁵⁰ ("the Act") addresses those actions in which an insurer may not deal in good faith with its insured. The purpose of the Act was to regulate the business of insurance by: "[D]efining, or providing for the determination of, all such practices which constitute in this state unfair methods of competition and unfair or deceptive acts or practices and by prohibiting the trade practices so defined and determined."⁵¹ The Act also lists specific actions by an insurance company handling a claim that would be considered "unfair claim settlement practices."⁵²

In *Hickman*, the Indiana Supreme Court dismissed the Act's applicability to the creation of a tort remedy for "bad faith" because the Act provided no private cause of action.⁵³ Although the Act does not provide a private remedy to the insured, the insurer faces the prospect of being assessed penalties by the commissioner of the Indiana Department of Insurance should its representatives engage in unfair claim settlement practices.⁵⁴ These penalties may also include monetary fines against the insurer.⁵⁵

One of the effects of creating a tort remedy for a breach of the duty of good faith is that now an insured is permitted to seek punitive damages.⁵⁶ One of the well documented purposes of assessing punitive damages is to punish the defendants and to deter similar conduct in the future.⁵⁷ By permitting an insured to seek punitive damages for alleged acts of "bad faith," the insurer is now subject to a double penalty if the insured obtains punitive damages and if the insurer is assessed penalties by the Insurance Commissioner for its actions.

The *Hickman* decision will likely create a plethora of litigation for practitioners on both sides of insurance law cases. Without a clear definition of

49. *Sharp* illustrates an example of what these authors would consider bad faith. In *Sharp*, an insurer refused to make payment for covered losses until the insurer settled with the insured for a disputed loss. See *supra* notes 12-14 and accompanying text.

50. IND. CODE ANN. § 27-4-1-4 to -19 (West 1993 & Supp. 1993).

51. IND. CODE ANN. § 27-4-1-1 (West 1993).

52. For a list of the "unfair claim settlement practices," practitioners should refer to IND. CODE ANN. § 27-4-1-4.5 (West 1993).

53. *Hickman*, 622 N.E.2d at 519, n.1. See also IND. CODE ANN. § 27-4-1-18 (West 1993).

54. IND. CODE ANN. §§ 27-4-1-5.6, -6 (West 1993).

55. *Id.*

56. *Hickman*, 622 N.E.2d at 520.

57. *Miller*, 608 N.E.2d at 983.

those acts that constitute "bad faith," insureds will be able to hold their right to pursue an action for "bad faith" for "ransom" against insurers to force insurers to settle cases.

Additionally, an insurer's right "to disagree" with an insured may be in jeopardy. As the *Hickman* court mentioned, an insurer has long possessed the ability to disagree with an insured about the insured's right to recover:

It is evident that the exercise of [the right to disagree as to the amount of recovery] may directly result in the intentional infliction of temporal damage, including the damage of interference with an insured's business (which an insured will undoubtedly consider to be oppressive). The infliction of this damage has generally been regarded as privileged, and not compensable, for the simple reason that it is worth more to society than it costs, i.e., the insurer is permitted to dispute its liability in good faith because of the prohibitive social costs of a rule which would make claims nondisputable.⁵⁸

As a practical matter, how long will the insurer's right to disagree exist? The insured now possesses an additional weapon as leverage against the insurer to settle a claim. Without any standard to define what action may constitute "bad faith," insurers must now, in asserting their right "to disagree," risk being assessed punitive damages for failing to settle a questionable claim.

The precedent created by the *Miller* decision would have best served those practitioners of insurance law. By requiring plaintiffs to establish independent torts like fraud or gross negligence, insureds damaged by such tortious conduct possessed the right to be compensated and to assess punitive damages against the insurer. However, insurance law after *Hickman* is now clouded. After *Hickman*, the cost of insurance will likely increase in light of the anticipated litigation. With no definition of "bad faith," insureds will no doubt attempt to define "bad faith" in any circumstance in which the insurer asserts his or her purported "right to disagree." Likewise, insurers will be tentative to respond to claims based upon this generalized, undefinable fear of acting in "bad faith." Litigation and appeals likely will abound as the court will be asked to focus upon insurers' actions and to define whether they constitute "bad faith."

58. *Hickman*, 622 N.E.2d at 520 (quoting *Vernon Fire & Casualty Ins. Co. v. Sharp*, 349 N.E.2d 173, 181 (Ind. 1976)).

II. INTENTIONAL ACTS EXCLUSION

A. Shooting Incidents

Over the last several years, many Indiana cases have addressed the "intentional acts" exclusion.⁵⁹ In most situations, the cases involve shootings by the insured.⁶⁰ During the survey period, Indiana courts issued three decisions involving such shootings. Two of the cases, *State Farm Casualty Co. v. Sanders*⁶¹ and *Allstate Insurance Co. v. Barnett*,⁶² contain a thorough discussion of the criteria relied upon by the courts in determining whether the intentional act exclusion applies. Although not included in this survey, practitioners within this area should review these cases.

Another shooting case is also worthy of attention. In *Hawkins v. Auto-Owners Mutual Insurance Co.*,⁶³ an insured who shot another person was convicted of attempted murder.⁶⁴ His insurer sought a declaratory judgment that no liability insurance coverage was available to the insured after the shooting victim's estate filed a lawsuit against the insured.⁶⁵ The trial court granted the insurer's motion after considering the criminal trial transcript as evidence in the declaratory judgment action.⁶⁶

On appeal, the Indiana Court of Appeals reversed the summary judgment entry, and held that a criminal conviction was not admissible in a subsequent civil case pursuant to existing precedent.⁶⁷ Although the court recognized that Indiana's General Assembly had enacted a statute that permitted the admission of a criminal judgment as evidence in a civil case,⁶⁸ it determined that any

59. The exclusion's language is usually very similar to the following:

1. Coverage L and Coverage M do not apply to:

a. bodily injury or property damage:

(1) which is either expected or intended by an insured.

State Farm and Casualty Co. v. Sanders, 805 F. Supp. 1453, 1455 (S.D. Ind. 1992).

60. Some previous Indiana cases include *Allstate Ins. Co. v. Herman*, 551 N.E.2d 844 (Ind. 1990); *Auto-Owners Mut. Ins. Co. v. Stroud*, 565 N.E.2d 1093 (Ind. Ct. App. 1991); and *Bolin v. State Farm Fire and Casualty Co.*, 557 N.E.2d 1084 (Ind. Ct. App. 1990).

61. 805 F. Supp. 1453 (S.D. Ind. 1992).

62. 816 F. Supp. 492 (S.D. Ind. 1993).

63. 608 N.E.2d 1358 (Ind. 1993).

64. *Id.*

65. *Id.*

66. *Id.*

67. *Id.* The Indiana Court of Appeals relied upon *Brooks v. State*, 291 N.E.2d 559 (Ind. Ct. App. 1973).

68. IND. CODE ANN. § 34-3-18-1.

statute conflicting with trial procedure rules enacted by the Supreme Court was null and void.⁶⁹

The Indiana Supreme Court, however, observed that federal courts have long permitted the admissibility of criminal convictions in a subsequent civil case.⁷⁰ Furthermore, the majority of jurisdictions in the United States also permit the introduction of criminal convictions in subsequent civil cases.⁷¹ Consequently, the court accepted Indiana's statute⁷² permitting the introduction of a criminal conviction in a subsequent civil case and affirmed the trial court's entry of summary judgment.⁷³

The importance of the *Hawkins* decision is that it will be easier for insurers to introduce evidence of an insured's intentional conduct if the insured was convicted of an intentional crime for the same conduct. However, practitioners should be wary of not producing other evidence of an insured's intentional conduct. Although the *Hawkins* court concluded that the criminal conviction conclusively established that coverage was excluded under the facts presented, such evidence will not always be conclusive. Instead, the criminal conviction is only one indicia necessary to satisfy the exclusion.

B. Non-shooting Incidents

The case of *Progressive Casualty Insurance Co. v. Morris*⁷⁴ involved a motorcycle accident in which an insurer sought to disclaim coverage by contending that the insured motorcycle rider acted intentionally in crossing a center line and striking another vehicle.⁷⁵ Although it involves the intentional act exclusion, this case best serves as a reminder about the steps an insurer must take to disclaim coverage properly.

In *Morris*, the injured motorist brought a lawsuit for personal injuries and property damage against the motorcycle driver.⁷⁶ After receiving notice of the lawsuit, the motorcyclist's insurer failed to take any action to represent the rider or to seek a declaratory judgment that no coverage existed.⁷⁷ The injured motorist obtained a default judgment and initiated garnishment proceedings against the insurer.⁷⁸ The insurer then appeared and attempted to claim that the

69. 608 N.E.2d at 1359.

70. *Id.* See FED. R. EVID. 803(22).

71. *Id.*

72. IND. CODE ANN. § 34-3-18-1 (West 1983).

73. 608 N.E.2d at 1359.

74. 603 N.E.2d 1380 (Ind. Ct. App. 1992).

75. *Id.* at 1382.

76. *Id.*

77. *Id.*

78. *Id.*

motorcyclist's actions were intentional and excluded from coverage.⁷⁹ Relying on *Liberty Mutual Insurance Co. v. Metzler*,⁸⁰ the Indiana Court of Appeals affirmed the trial court's grant of summary judgment to the injured motorist.⁸¹ Specifically, the court determined that the insurer was collaterally estopped from litigating this issue when it failed to intervene in the other driver's action against the insured.⁸²

The *Morris* decision is important as a reminder to insurers about protecting their rights to disclaim coverage. As stated in the *Metzler* decision:

An insurer, after making an independent determination that it has no duty to defend, must protect its interest by either filing a declaratory judgment action for a judicial determination of its obligations under the policy or hire independent counsel and defend its insured under a reservation of rights. (citations omitted). As we have indicated, '[An insurer] can refuse to defend or clarify its obligation by means of a declaratory judgment action. If it refuses to defend, it does so at its peril. (citations omitted) . . .' An insurer, having knowledge its insured has been sued, may not close its eyes to the underlying litigation, force the insured to face the risk of litigation without the benefit of knowing whether the insurer intends to defend or to deny coverage, and then raise policy defenses for the first time after judgment has been entered against the insured.⁸³

III. PROPERTY AND NON-AUTO LIABILITY CASES

A. Definition of "Occurrence"

In *City of Jasper v. Employers Insurance*,⁸⁴ the Seventh Circuit was asked to address when an "occurrence" arises to initiate coverage under a comprehensive general liability policy.⁸⁵ In *Jasper*, a city issued two building permits to a commercial developer.⁸⁶ After the developer began construction, neighbors filed a zoning complaint. From the proceedings of the zoning complaint, it was

79. *Id.*

80. 586 N.E.2d 897 (Ind. Ct. App. 1992).

81. 603 N.E.2d at 1382.

82. 603 N.E.2d at 1383.

83. *Metzler*, 586 N.E.2d at 902.

84. 987 F.2d 453 (7th Cir. 1993).

85. *Id.* at 454.

86. *Id.* at 455.

determined that the building permits were issued in violation of local ordinances. The developer then demolished the newly constructed building.⁸⁷

In an underlying lawsuit, the developer sued the city for negligence in issuing the building permits.⁸⁸ The city requested that its insurer defend the lawsuit, but the insurer refused on the basis that the “occurrence” as defined by the policy,⁸⁹ took place outside the policy period.⁹⁰

In interpreting this policy language, the Seventh Circuit concluded that the “occurrence” did not arise until the property damage actually resulted.⁹¹ Thus, the date that the developer was ordered to demolish the building became the date of the “occurrence” of the property damage.⁹² This date occurred after the policy period expired and no coverage was found to exist.⁹³ Although the city’s negligence may have occurred during the policy period, the “occurrence” happened after the policy period expired.

The Seventh Circuit also recognized that the type of loss resulting from the city’s negligence was not the type of loss for which the parties to the insurance contract would contemplate to be insured.⁹⁴ In a departure from the ruling of the district court, the Seventh Circuit found that there was no “accident” in this case.⁹⁵ Instead, the city engaged in an “action” that resulted in damage to the developer.⁹⁶ The court distinguished between “actions” and “accidents,” and determined that the city could not obtain insurance coverage for an “action” under this policy.⁹⁷

87. *Id.*

88. *Id.*

89. The policy language provided as follows:

‘[O]ccurrence’ means an accident, including continuous or repeated exposure to conditions, which results in *bodily injury or property damage* neither expected nor intended from the standpoint of the *insured*.

Id. at 454 (emphasis in original).

90. *Id.* at 455.

91. *Id.* at 457.

92. *Id.*

93. *Id.*

94. Specifically, the court stated:

We think no realistic insured city could rationally believe it was covered for the consequences of judgmental decisions it might make in the course of performing its municipal duties — even though these decisions might ultimately be reversed by the state court. The conduct of the insured was not an accident; rather, it was part of the normal and expected consequences of government. There may be some language or some insurance coverage to protect a governmental entity from this type of result, but the policy in question does not.

Id. at 457.

95. *Id.*

96. *Id.*

97. *Id.*

B. Interpretation of One-Year Provision to Bring Suit

During the survey period, two decisions addressed and interpreted the one-year limitation provision found in most insurance policies, which require an insured to bring suit against an insurer within one year from the date of loss if an insured believes the company improperly refused to pay a claim.⁹⁸

In *Brunner v. Economy Preferred Insurance Co.*,⁹⁹ the insured suffered hail damage to the roof of a commercial property.¹⁰⁰ However, the insured did not discover the hail damage until nearly eighteen months after the damage occurred.¹⁰¹ Upon discovery, the insured notified the insurer of the damage, but the insurer immediately denied the claim because it had not been timely asserted.¹⁰²

When the insured sued the insurer for breach of contract, the insurer moved for summary judgment, contending that the one-year limitation barred the action. In response, the insured argued that a "discovery" rule should apply in interpreting the one-year limitation period.¹⁰³

Characterizing the case as one of first impression, the Indiana Court of Appeals rejected the insured's argument.¹⁰⁴ The court concluded that the failure to discover the damage did not toll the policy provision which limited the period in which the insured could bring suit.¹⁰⁵ The court based its decision upon the fact that an insurance company requires prompt notice of a loss so that it will have the opportunity to make a timely and adequate investigation of the circumstances surrounding the loss.¹⁰⁶ The passage of time can frustrate the insurer's ability to prepare an adequate defense.¹⁰⁷ Thus, a policy provision containing a strict deadline for notifying the carrier of claims and bringing suit on those claims within the deadline is valid in Indiana.¹⁰⁸

98. This one-year limitation clause is similar to the following:

D. LEGAL ACTION AGAINST US

No one may bring a legal action against us under this Coverage Part unless:

1. There has been full compliance with all the terms of this Coverage Part; and
2. The action is brought within one year after the date on which direct physical loss or damage occurred.

Brunner v. Economy Preferred Ins. Co., 597 N.E.2d 1317, 1318 (Ind. Ct. App. 1992).

99. *Id.* at 1317.

100. *Id.* at 1318.

101. *Id.*

102. *Id.*

103. *Brunner*, 597 N.E.2d at 1318.

104. *Id.* at 1319-20.

105. *Id.* at 1319.

106. *Id.* See also *Miller v. Dilts*, 463 N.E.2d 257 (Ind. 1984).

107. *Brunner*, 597 N.E.2d at 1319.

108. *Id.* at 1319-20.

The second case addressing the one-year limitation issue was *Wood v. Allstate Insurance Co.*¹⁰⁹ An insured suffered a loss from a fire that started late in the evening but was not extinguished until the early morning hours of the next day.¹¹⁰ A year passed as the insurer investigated the claim after apparently suspecting the insured of arson.¹¹¹

On the anniversary of the date the fire was extinguished, the insured filed suit against the insurer for breach of contract.¹¹² After the insurer filed a summary judgment motion, the court determined that the date the fire began was the time the one-year limitation began to run.¹¹³ Consequently, the insured's suit was untimely pursuant to the one-year limitation.¹¹⁴

C. Interpretation of Liability Deductible on Multiple Claims

In rare circumstances, certain insurance policies are written with liability insurance deductibles to apply to certain type of claims. In particular, painting companies and car washes have deductibles in their liability policies because of the possibility that multiple units will be damaged in the event of one negligent act.

In *General Casualty v. Diversified Painting Service, Inc.*,¹¹⁵ the court was asked to interpret a policy's deductible provision after a liability claim was made against an insured paint company. The insured's actions damaged sixty to eighty cars after failing to control the overspray at a project.¹¹⁶ The insured's policy contained a "per claim" deductible of \$250.¹¹⁷ The insured attempted to argue that its policy was ambiguous in that the deductible should apply to the "occurrence" of the overspray rather than to each claim presented.¹¹⁸ The argument before the court concerned whether the generalized act of overspraying

109. 815 F. Supp. 1185 (N.D. Ind. 1993).

110. *Id.* at 1189-90.

111. *Id.*

112. *Id.* at 1188.

113. *Id.* at 1191.

114. *Id.*

115. 603 N.E.2d 1389 (Ind. Ct. App. 1992).

116. *Id.* at 1390.

117. *Id.*

118. *Id.* The insured relied upon the following policy language:

[The insured's] obligation to pay damages because of 'property damage' applies only in excess of any deductible amount stated in the Declarations. The limits of insurance applicable to each 'occurrence' shall be reduced by the amount of such insurance.

....

The deductible amount applies to all damages because of 'property damages' sustained by one person or organization as a result of any one occurrence.

The insurer relied upon language in the declaration page which stated that a "PROPERTY DAMAGE PER CLAIM DEDUCTIBLE" of \$250 applied. *Id.* at 1390-91.

was a single occurrence that required the application of a single deductible, or whether the deductible must be applied to each damaged vehicle.¹¹⁹

Based upon the policy's language, the court held that each damaged vehicle was subject to a separate liability deductible.¹²⁰ Specifically, the court determined that the policy language indicated that the parties intended for the insurer to apply a separate deductible to each individual property claim.¹²¹

The case is worthy reading for those attorneys representing an insured who has the type of business where a single generalized activity can result in multiple injuries or damages.

IV. HEALTH AND LIFE INSURANCE

A. Avoidance of Coverage—Insured's Material Misrepresentation

*Curtis v. American Community Mutual Insurance Co.*¹²² contains an excellent analysis of the elements of a material misrepresentation by an insured in a health insurance application. All practitioners dealing with a material misrepresentation case may wish to review this decision.

In *Curtis*, the insurer accused the insured of improperly answering questions on her application for health insurance.¹²³ Had the insured answered the application properly, the responses most likely would have revealed that the insured was suffering from the early symptoms of cervical cancer.¹²⁴ After the insurer issued the policy, the insured received a hysterectomy for which the insurer refused to pay.¹²⁵ The insurer argued that had it known about the insured's earlier problems revealed in a pap smear, the insurer would have issued the policy with an endorsement excluding coverage for disorders of the genital organs.¹²⁶

The *Curtis* court noted that a misrepresentation on an insurance application is "material" if the omitted fact or statement, if truly stated, might have influenced the insurer's decision to issue the policy or charge a higher premium.¹²⁷ A false representation in an insurance policy concerning a

119. *Id.* at 1390.

120. *Id.*

121. *Id.*

122. 610 N.E.2d 871 (Ind. Ct. App. 1993).

123. *Id.* at 873.

124. *Id.* at 874.

125. *Id.* at 873.

126. *Id.* at 874.

127. *Id.*

material fact will void the policy even if the representation was made innocently.¹²⁸

The insured argued that the insurer acted unreasonably in failing to investigate because the name and location of the insured's doctor were on the application.¹²⁹ The Court recognized that an insurer may rely on the insured's answers on an insurance application without conducting any investigation, if the insurer has no reason to doubt the validity of the answers.¹³⁰ In this situation, the insurer was not placed on "inquiry notice" of a sufficient nature to prompt it to conduct additional investigation.¹³¹

B. Life Insured Proceeds—Murder By Beneficiary

In *Estate of Chiesi v. First Citizens Bank*,¹³² a wife, who was a beneficiary of two life insurance policies on her husband, murdered her husband.¹³³ Because she was convicted of murder, the proceeds of the policies were transferred to the estate of the deceased.¹³⁴

The *Estate of Chiesi* court was faced with the question of whether the proceeds should flow to the children of the decedent, or whether the creditors of the father's estate should be entitled to share the proceeds.¹³⁵ The Indiana Court of Appeals previously had held that claims against the proceeds of life insurance policies are normally exempt from a creditor's claims when the policy names a spouse as a beneficiary and the proceeds are for the benefit of the spouse.¹³⁶ However, the Indiana Supreme Court held that the proceeds were not exempt from attachment by creditors of the estate.¹³⁷ Consequently, the children of the insured decedent were required to share the proceeds from the life insurance policies with their father's creditors.

128. *Id.*

129. *Id.*

130. *Id.*

131. *Id.* at 874-75.

132. 613 N.E.2d 14 (Ind. 1993).

133. *Id.*

134. IND. CODE ANN. § 29-1-2-12.1(a) (West Supp. 1992).

135. *Estate of Chiesi*, 613 N.E.2d at 14.

136. See *Estate of Chiesi v. First Citizens Bank*, 604 N.E.2d 3 (Ind. Ct. App. 1992), *aff'd*, 613 N.E.2d 14 (Ind. 1993). See also IND. CODE ANN. § 27-1-12-14(c) (West Supp. 1992).

137. *Estate of Chiesi*, 613 N.E.2d at 15.

V. AUTOMOBILE CASES

A. General Principles

1. *Permissive Use of An Automobile.*—The issue of permission to use an automobile is one that arises frequently to insurance practitioners. The *Manor v. Statesman Insurance Co.*¹³⁸ decision includes a good description of the circumstances under which a permissive user of an automobile will have insurance coverage.

In this case, an employee of the named insured was using the insured's dump truck.¹³⁹ The employer previously had instructed the employee that he had permission only to drive the dump truck to and from a job site and his home,¹⁴⁰ and had expressly instructed the employee not to use the dump truck for personal use.¹⁴¹ The employee sought the employer's permission to use the truck for his personal use.¹⁴² He was unable to reach the employer, but used the dump truck anyway.¹⁴³ During this use, he was involved in an accident and was sued for damages by the injured parties.¹⁴⁴

The insurer sought declaratory relief from defending or indemnifying the employee because of the employee's failure to obtain permission as required by the policy.¹⁴⁵ The court acknowledged that in determining whether an individual had the permission of the insured, Indiana had always followed the "liberal rule."¹⁴⁶

However, the court concluded that the employer's express instructions restricting the employee's personal use of the vehicle overrode any implied permission that the employee may have thought he possessed.¹⁴⁷ In fact, the court recognized the employee's failure to reach the employer as a realization that he did not have permission to use the truck.¹⁴⁸

138. 612 N.E.2d 1109 (Ind. Ct. App. 1993).

139. *Id.* at 1111-12.

140. *Id.* at 1111.

141. *Id.*

142. *Id.* at 1112.

143. *Id.* The employee argued at trial that he had implied permission because the employer never called back to tell him not to use the truck.

144. *Id.* at 1112.

145. *Id.*

146. *Id.* at 1113. The "liberal rule" was been defined as a situation in which "one who has permission of an insured owner to use his automobile continues as such a permittee while the car remains in his possession, even though that use may later prove to be for a purpose not contemplated by the insured owner when he entrusted the automobile to the use of such permittee." *Arnold v. State Farm Mut. Auto. Ins. Co.*, 260 F.2d 161, 165 (7th Cir. 1958).

147. *Id.* at 1115.

148. *Id.* at 1114.

This case demonstrates how Indiana courts will review the facts in every case carefully. Furthermore, even though an employer has a policy that prohibits personal use of a company vehicle, there may be implied permission if the employer has allowed employees to routinely disregard company policy.¹⁴⁹

2. *Temporary Substitute Vehicle*.—In *Deadwiler v. Chicago Motor Club Insurance Co.*,¹⁵⁰ the court addressed an issue of first impression in Indiana. The specific question was whether an insured's daughter had coverage under the insured's policy if the insured had a "temporary substitute vehicle."¹⁵¹ The court held that, under Indiana law, a "temporary substitute vehicle" is "a car which was in the possession or under the control of the insured to the same extent and effect as the disabled car of the insured would have been except for its disablement."¹⁵² In this particular case, the court found coverage did not exist for the insured's daughter because the insured did not have possession or control over the vehicle.¹⁵³

3. *Definition of "Maintenance or Use" of a Vehicle*.—Practitioners may wish to review *Shelter Mutual Insurance Co. v. Barron*¹⁵⁴ for an example of an interesting factual situation and its application to a homeowner's policy. In *Barron*, the plaintiff was sitting on the hood of the insured's truck when a disagreement erupted between the two.¹⁵⁵ The plaintiff was injured when the insured grabbed her and pulled her from the hood of the truck.¹⁵⁶ After the plaintiff sued the insured, the insured's insurance company sought to avoid coverage under a policy exclusion in the insured's homeowner's policy for any injury that arose out of the "ownership, maintenance or use" of a motor vehicle.¹⁵⁷ However, the court rejected this argument, finding that the involvement of the truck was merely incidental to the injury.¹⁵⁸ As a result, coverage existed under the homeowner policy.

149. *Id.* at 1113-14.

150. 603 N.E.2d 1365 (Ind. Ct. App. 1992).

151. *Id.* at 1366-67. The policy defined "temporary substitute vehicle" to mean:

4. Any auto or trailer you do not own while used as a temporary substitute for any other vehicle described in this definition which is out of normal use because of its:

a. breakdown;

b. repair.

Id. at 1367.

152. *Id.* at 1369 (quoting *Tanner v. Pennsylvania Thresherman and Farmers Mut. Casualty Ins. Co.*, 226 F.2d 498, 500 (6th Cir. 1955)).

153. *Deadwiler*, 603 N.E.2d at 1369.

154. 615 N.E.2d 503 (Ind. Ct. App. 1993).

155. *Id.* at 505.

156. *Id.*

157. *Id.* at 506.

158. *Id.*

4. *Resident of Household.*—*Alexander v. Erie Insurance Exchange*¹⁵⁹ addressed whether a young man was a resident of his father's or mother's household¹⁶⁰ for purposes of utilizing liability coverage.¹⁶¹ If the young man could establish that he was a resident of his mother's household, then he would have liability coverage for an automobile accident under his mother's liability policy.¹⁶² The court discussed several factors regarding the issue of residency in automobile insurance policies.¹⁶³ The factors include "(1) physical presence (intending to have a fixed abode for the time being, to dwell under the same roof and compose a family); (2) the unrestricted access to the insured's home and its contents; (3) the intent of the contracting parties to provide coverage; and (4) the totality of the evidence."¹⁶⁴

In this case, the young man left his mother's home five months before the accident and was residing in another state with his father.¹⁶⁵ The young man also obtained a driver's license and engaged in full-time employment in the other state.¹⁶⁶ Additionally, after the young man left his mother's home, his mother contacted the insurer and removed him as a named driver on her policy in an effort to reduce her premiums.¹⁶⁷ The court concluded that the young man was not a resident of his mother's home and was not entitled to liability coverage under her policy.¹⁶⁸

B. Uninsured and Underinsured Motorist Coverage

1. *Consent to Settle with the Underinsured Motorist.*—*Losiniecki v. American States Insurance Co.*¹⁶⁹ analyzes a situation in which an insured settles a personal injury claim and releases an underinsured motorist without first obtaining the consent to settle from the insured's own underinsured motorist carrier. In *Losiniecki*, the insured was injured as he was riding as a passenger on a motorcycle.¹⁷⁰ He settled his claim against the motorcycle driver without

159. 982 F.2d 1153 (7th Cir. 1993).

160. *Id.*

161. The mother's insurance policy in this case provided coverage for the "named-insured," "relatives" (while they were driving an insured car) and non-owned vehicles when driven by "relatives." *Id.* at 1155.

162. *Id.*

163. *Id.* at 1156.

164. *Id.*

165. *Id.* at 1155.

166. *Id.*

167. *Id.* at 1156.

168. *Id.* at 1160.

169. 610 N.E.2d 878 (Ind. Ct. App. 1993).

170. *Id.* at 879.

obtaining his own insurer's consent.¹⁷¹ Later, when the insured sought underinsured motorist benefits, his insurer denied coverage because the insured had already released the underinsured motorist.¹⁷²

The court strictly enforced the policy provision that required the insurer's consent to the insured's settlement with the underinsured motorist,¹⁷³ stating that "[c]ourts cannot ignore the plain wording of an insurance contract."¹⁷⁴ Rather than requiring the insurer to demonstrate prejudice by the release of the underinsured motorist, the court simply construed the contract.

2. *Coverage for Shooting from an Uninsured Vehicle.*—In *State Farm Mutual Automobile Insurance Co. v. Spotten*,¹⁷⁵ a plaintiff was shot by a passenger in a passing uninsured motor vehicle.¹⁷⁶ The plaintiff sought underinsured motorist benefits for his injuries.¹⁷⁷

Although this particular argument may sound specious, the Indiana Court of Appeals noted a long history of cases from other jurisdictions which had determined that a shooting from an uninsured motor vehicle created an underinsured motorist claim.¹⁷⁸ Likewise, the court referred to another line of cases in which courts have determined that the use of a vehicle in a shooting case is merely "incidental" to the shooting.¹⁷⁹ After reviewing both lines of cases, the court decided to follow the more conservative line, stating that the shooting was a random act of violence that was not a considered risk by the parties to the insurance contract.¹⁸⁰ Therefore, no underinsured motorist coverage was available.¹⁸¹

3. *Self-insured entities.*—The *City of Gary v. Allstate Insurance Co.*¹⁸² addresses whether self-insured entities must provide underinsured motorist coverage for injuries sustained by persons operating the self-insured's vehicles. The Indiana Court of Appeals determined that self-insured entities were required to provide the same coverage as if they were insured.¹⁸³ The court also deter-

171. The decision does not cite the policy language requiring consent of the underinsured carrier but states the policy provided "that coverage is not provided where the insured person settles a bodily injury or property damage claim without the consent of [the insurer]." *Id.*

172. *Id.*

173. *Id.*

174. *Id.*

175. 610 N.E.2d 299 (Ind. Ct. App. 1993).

176. *Id.* at 300.

177. *Id.*

178. *Id.* at 301.

179. *Id.*

180. *Id.* at 302.

181. *Id.*

182. 612 N.E.2d 115 (Ind. 1993).

183. *City of Gary v. Allstate Ins. Co.*, 598 N.E.2d 625, 628-29 (Ind. Ct. App. 1992), *rev'd*, 612 N.E.2d 115 (Ind. 1993).

mined that the self-insured entity, the city of Gary, was not required to carry uninsured motorist coverage because the city was immune from liability arising from the negligence of persons other than city employees.¹⁸⁴ The Indiana Supreme Court disagreed, holding that self-insured entities were not required to provide uninsured motorist benefits.¹⁸⁵ In view of the fact that self-insured entities do not have “insurance policies,”¹⁸⁶ they are not required to offer the same coverage as required under Indiana’s financial responsibility statute.¹⁸⁷

184. *Id.* at 630.

185. *City of Gary*, 612 N.E.2d at 118-19.

186. *Id.* at 119. The rationale behind the Indiana Supreme Court’s ruling was that the Financial Responsibility Act requires certain types of coverage in policies “issued” by insurance companies. Self-insured entities do not have insurance policies. *Id.*

187. *Id.* Indiana’s financial responsibility act is located at IND. CODE ANN. § 27-7-5-2 (West Supp. 1992).

SURVEY OF INDIANA TRADE SECRET LAW: UTSA SURVIVES AN ELEVENTH-YEAR SCARE

CHARLES R. REEVES*

INTRODUCTION

Through its first decade, the Indiana version of the Uniform Trade Secrets Act ("UTSA")¹ received little attention from Indiana courts. During the survey period,² two opinions by the state's appellate courts took the Indiana UTSA, and the business and legal communities, on a roller coaster ride from relative obscurity to national attention in defining what is a trade secret subject to protection.³

In *Amoco Production Co. v. Laird*,⁴ the Indiana Supreme Court and Court of Appeals wrote to a cornerstone issue in determining trade secret status regardless of the type of information involved.⁵ The impact of these decisions seems clear. Trade secret owners can take heart that the value of their time, effort, and money spent developing such "information" will more likely survive attack. Those who would misappropriate can no longer hide behind a simple hindsight test of what "could have" been. The public can rest knowing that further erosion of commercial ethics has been slowed and the development of new products and technology encouraged by protecting their value consistent

* Partner, Woodard, Emhardt, Naughton, Moriarty & McNett of Indianapolis, Indiana, specialists in patent, trademark, copyright and other intellectual property law. B.S., 1973, Purdue University in metallurgical engineering; J.D., 1977, Indiana University School of Law—Indianapolis.

1. The Indiana UTSA, substantially derived from the Uniform Trade Secrets Act, was added by Acts 1982, P.L. 148, § 1, "to effectuate its general purpose to make uniform the law with respect to the subject matter of this chapter among states" and to expressly displace "all conflicting law of this state pertaining to the misappropriation of trade secrets, except contract law and criminal law." IND. CODE §§ 24-2-3-1(b) and (c). Refer to the beginning of this Chapter for a list of other jurisdictions wherein the UTSA has been adopted. For actual text of the Uniform Act, and for variation notes and annotation materials for adopting jurisdictions, see *Uniform Laws Annotated*, Master Edition, Vol. 14.

2. Approximately Jan. 1, 1993 to Oct. 31, 1993.

3. *Amoco Prod. Co. v. Laird*, 622 N.E.2d 912 (Ind. 1993), *rev'g*, 604 N.E.2d 1249 (Ind. Ct. App. 1992).

4. *Id.*

5. The section of the Indiana UTSA reviewed is IND. CODE § 24-2-3-2, defining "trade secret" as:

information, including a formula, pattern, compilation, program, device, method, technique, or process, that:

(1) derives independent economic value, actual or potential, from not being generally known to, and not being readily ascertainable by proper means by, other persons who can obtain economic value from its disclosure or use; and
(2) is the subject of efforts that are reasonable under the circumstances to maintain its secrecy.

As added by Acts 1982, P.L. 148, § 1. Amended by P.L.8-1993, § 343.

with policies long underpinning trade secrets law. And finally, those who favor common sense statutory construction, where words mean what they say and nothing more, can savor this momentary victory and wonder, "What was the commotion all about?"

However viewed, the drama was certainly present as Indiana's highest courts squared off on this central issue in trade secrets law under the UTSA.

I. THE FIRST TEN YEARS

Only six Indiana cases focused on trade secret law under the Indiana UTSA from its enactment in 1982 into 1992.⁶ Historically, all six cases derive from the Indiana Court of Appeals, with four districts contributing. All dealt exclusively with customer lists and related data as the alleged "trade secret" information.⁷ Notable among this group is *Steenhoven v. College Life Insurance Co. of America*,⁸ which received negative attention as far away as California.⁹ Also notable is *Xpert Automation System Corp. v. Vibromatic Co.*,¹⁰ where the Court of Appeals attempted to draw conclusions from the earlier cases and in so doing, set the stage for last year's ride.

II. THE AMOCO PRODUCTION CO. V. LAIRD¹¹ DECISIONS

A. Background Facts

The operative facts in *Amoco Production Co. v. Laird* appear without

6. *Xpert Automation Sys. Corp. v. Vibromatic Co., Inc.*, 569 N.E.2d 351 (Ind. Ct. App. 1991); *The Prudential Ins. Co. of Am. v. Baker*, 499 N.E.2d 1152 (Ind. Ct. App. 1986); *Michels v. Dyna-Kote Indus., Inc.*, 497 N.E.2d 586 (Ind. Ct. App. 1986); *Kozuch v. CRA-MAR Video Ctr., Inc.*, 478 N.E.2d 110 (Ind. Ct. App. 1985); *The College Life Ins. Co. of Am. v. Austin*, 466 N.E.2d 738 (Ind. Ct. App. 1984); *Steenhoven v. College Life Ins. Co. of Am.*, 458 N.E.2d 661 (Ind. Ct. App. 1984), *reh'g denied*, 460 N.E.2d 973 (1984). The Indiana UTSA has also received only minor attention from the legislature. A 1984 amendment, P.L. 50-1984, §§ 3 and 4, rearranged a provision dealing with a court's ability to order payment of a "reasonable royalty," and redesignated subsections accordingly. A 1993 amendment, P.L. 8-1993, § 343, added "limited liability company" to the definition of "Person" under the act.

7. During this time, the Indiana Supreme Court dealt with the UTSA only once holding that it "merely articulates the common law." The Court entered a permanent injunction in the case even though there was no statutory authority to do so, since the misappropriation preceded the effective date of the act. *Wolfe v. Tuthill Corp.*, 532 N.E.2d 1, 2 (Ind. 1988). Two federal district court cases also applied the Indiana UTSA during this period, both in a customer list and restrictive covenant context. *Fleming Sales Co., Inc. v. Bailey*, 611 F. Supp. 507 (N.D. Ill. 1985); *Prudential Ins. Co. of Am. v. Crouch*, 606 F. Supp. 464 (S.D. Ind. 1985).

8. 458 N.E.2d 661.

9. See James H. Pooly, *The Uniform Trade Secrets Act: California Civil Code § 3426*, 1 SANTA CLARA COMPUTER & HIGH-TECH. L.J. 193, 198 n.19 (1985); MELVIN F. JAGER, *TRADE SECRETS LAW* § 3.04 at 3-50 (1991).

10. 569 N.E.2d 351.

11. 622 N.E.2d 912.

substantial dispute.¹² Relying heavily on recitations by the Indiana Supreme Court and Court of Appeals, those facts most critical to the issues follow. The plaintiff, Amoco Production Company (“Amoco”), was in the oil business and had a reputation for developing new sources of oil in the continental United States. The defendants, William D. Laird, Laird Exploration Company and others (“Laird”), were also in the oil business, as a Texas-based wildcatter and oil exploration financier. Only through the actions of John Clendenning, an Amoco geologist and former Laird neighbor, did their paths cross and this conflict arise.

In early 1991, Amoco formed a team of experts to study a large area of the Northeast Central United States in the hope of locating large reserves of oil within southern Michigan, northeastern Indiana, and northwestern Ohio. This area was chosen, at least in part, because of geological fault lines favorable for such sizable oil quantities. The Amoco team first reviewed published geologic survey literature, examined substantial proprietary documentation kept by Amoco on this area, and interviewed Amoco personnel to take advantage of previous experience. The Indiana Supreme Court wrote that “[t]wenty-four possible production locations were identified through this process.”¹³ Further statistical evaluation narrowed the search to four sites, and additional assessment allowed the team to “refine its focus to a 13,000-square-mile area in southern Michigan and northern portions of Ohio and Indiana known as the Trenton Black River formation.”¹⁴

Based on this preliminary work, a microwave radar study was commissioned with Airborne Petroleum, Inc. (“Airborne”) using navigational grids designed by Amoco’s team. The hope was to locate trending geological fault patterns relying on radar to detect micro-emissions associated with large concentrations of underground hydrocarbons. The Airborne study took a year to complete at a cost to Amoco of \$150,000.00. The accumulated raw data was forwarded by Amoco to QC Data, Inc. (“QC”), which digitized the information and converted it into maps corresponding to this area. It was undisputed that Amoco used internal security measures and contractual arrangements with Airborne and QC to preserve the confidentiality of these survey results.¹⁵

The Amoco team evaluated these maps and commissioned another microwave radar study in Fulton, Marshall and Kosciusko counties in northern

12. This is difficult to say for certain, as true to its trade secret nature, the record and briefs below were under seal and therefore unavailable for this Article. An acknowledgement is given, under the circumstances, to both Indiana appellate courts for possibly being more detailed in their statements of facts than would ordinarily be the case. These aid greatly in understanding the bases underlying their decisions.

13. *Amoco Prod. Co.*, 622 N.E.2d at 914.

14. *Id.*

15. It was for this reason that both Indiana courts found no issue as to part two of the “trade secret” definition in IND. CODE § 24-2-3-2.

Indiana. Analysis of these results identified two primary oil sites with an estimated yield of twenty-two to twenty-three million barrels of oil. This was sizeable, but nonetheless fell short of the goal of fifty million barrels. Following on-site inspection by an Amoco senior land negotiator, the team met to assess the two suspected reserve locations. The final recommendation was to delay actual site development pending future study, at least in part because of the estimated shortfall in production potential.

Clendenning was dissatisfied with the Amoco team recommendation. On November 9, 1991, he sent "a facsimile transmission of a page from a road atlas to Laird upon which he had drawn circles accurately defining location of the potential reserve sites."¹⁶ Moving quickly on this information, Laird traveled to Fulton County, Indiana, inspected the sites, hired a dowser¹⁷ to better determine the perimeter of the oil pool reserves, and proceeded in short order to obtain land leases for oil and gas exploration in a significant portion of these sites.

Meanwhile, also in November, 1991, Amoco management overruled the team's recommendation and directed that site development proceed at once. Learning this, Clendenning contacted Laird but could not stop its leasing efforts. One might imagine Amoco's surprise when its land negotiator discovered that extensive lease purchases for these reserve sites had only recently been sold. Clendenning later confessed to his unauthorized disclosure, and Amoco brought suit against Laird on January 24, 1992.¹⁸

After a three-day hearing, the trial court entered a preliminary injunction prohibiting Laird from using or disclosing the information in the Clendenning map, further pursuing or developing leases in these areas, and using or disclosing any other information gained from Clendenning. Findings of fact and conclusions of law were then entered, and an interlocutory appeal followed.

B. Court of Appeals Finds Xpert Controlling

On appeal, Laird argued the trial court committed reversible error in finding that the information concerning the geographic location of the oil field sites [placed on the map by Clendenning] was a trade secret protected under the Uniform Trade Secrets Act, I.C. § 24-2-3-1 *et seq.* Laird Exploration argues this information was discoverable by reason-

16. *Amoco Prod. Co.*, 622 N.E.2d at 914.

17. As the Court of Appeals reported, "[a] dowser is an individual who purports to have the ability to find underground substances with the use of divining rods." 604 N.E.2d at 1251, n.2.

18. Clendenning was not a named party to this case, at least on appeal. It is not known what other action Amoco brought or may yet bring against Clendenning on these facts, or what other arrangement was made. It is also outside this Article's scope to consider what other claims Amoco could have brought or may yet bring against Laird, alone or jointly with Clendenning, for wrongs other than trade secret misappropriation.

able means and therefore could not be a trade secret as a matter of law, citing *Xpert Automation Systems Corp. v. Vibromatic Co., Inc.*, 569 N.E.2d 351 (Ind. App. 1991).¹⁹

The Court of Appeals began by observing its standard for review in such cases is for abuse of discretion.²⁰ The court quoted the definition of trade secret at Indiana Code section 24-2-3-2, and found no dispute as to Amoco's efforts to maintain secrecy of the information.²¹ The court then focused on the trial court's conclusion that the "proprietary information referred to is not readily ascertainable to those interested in the market place in that the methods of accumulating this information were not simple or easy to accomplish, and are expensive to develop."²² The Court of Appeals cited the trial court's findings in support of this conclusion, and held that the issue was whether a finding of "difficult and costly to develop by independent means" justified the grant of preliminary relief against Laird on the basis that the Amoco information on the Clendenning map is a trade secret under the Indiana UTSA.

Finding this "same issue" presented in the recent case of *Xpert Automation System v. Vibromatic*,²³ the Court of Appeals initially wrote "that *Xpert* is controlling on this issue".²⁴ The court later found a

total lack of findings in this case to support the trial court's conclusion that the geographic information disclosed by Clendenning was not readily ascertainable by Laird Exploration. As in *Xpert*, there is no finding here that it was not *economically feasible* for Laird Exploration to identify the location of the Indiana oil fields by means other than Clendenning's map. The court's finding that it would be more difficult and costly for Laird Exploration to obtain the relevant information by alternative means will not suffice; that notion was explicitly rejected in *Xpert*.²⁵

This case was further likened to *Xpert*, the court held that "an absence of evidence indicating that the information at issue 'could not have been created by any means other than [plaintiff's] business operations.'"²⁶

19. *Laird*, 604 N.E.2d at 1252.

20. *Id.* at 1252 (citing *Harvest Ins. Agency, Inc. v. Inter-Ocean Ins. Co.*, 492 N.E.2d 686, 688 (Ind. 1986)).

21. *Id.* at 1252.

22. *Id.* at 1253; Trial Record at 173L.

23. *Xpert*, *supra* note 6.

24. *Id.* at 1252.

25. *Id.* at 1253 (emphasis added). It is noteworthy here that there is no debate in the Indiana Supreme Court or Court of Appeals decisions over whether Laird could have in fact duplicated the precise information in the Clendenning map under any circumstances. This seems unlikely, and a well-made argument on this point could have aided greatly at trial and on appeal.

26. *Id.* (citing *Kozuch v. CRA-MAR Video Center, Inc.*, 478 N.E.2d 110, 113 (Ind. Ct. App. 1985)).

In closing, the Court of Appeals noted that the knowledge of fault lines as guiding initial surveys and the use of microwave radar studies as a survey tool are generally known in the industry. The court also brought up, only to reject, the contention that Laird's wrongdoing or any independent duty owed to Amoco would suffice for more than a finding of misappropriation of information under Indiana Code section 24-2-3-3(a). In reversing the preliminary injunction, the court did so only "insofar as it prohibits Laird Exploration from pursuing or developing leases in the oil fields as indicated on Clendenning's map or otherwise using or disclosing the information conveyed by the map."²⁷

C. Supreme Court Rejects "Economic Infeasibility" Standard

In granting transfer, the Indiana Supreme Court cited *Amoco Production Co. v. Laird* as a "case of first impression to address the meaning of the phrase 'not being readily ascertainable' as used in the Indiana Uniform Trade Secrets Act"²⁸ The Court thereby accepted its first true consideration of this eleven year-old Indiana Act.²⁹ The result is a well-reasoned expression by the Court on this cornerstone issue separating those who develop new products and technologies trusting in trade secret protection, and those who would benefit from the developments of others, given the opportunity, without the same investment or risk.³⁰

27. *Id.* at 1254. The Court of Appeals let stand the trial court's injunction against use or disclosure of other information gained in the case. It also noted that, as in *Xpert*, its decision was limited by the trial court's findings based on the record of this interlocutory appeal, and acknowledged that a different record may be developed in a full trial on the merits.

28. *Amoco Prod. Co.*, 622 N.E.2d at 913.

29. This decision was applauded by some, including the Amicus Curiae representing the Indianapolis Bar Association, Patent, Trademark and Copyright Section, who participated both in writing and on oral argument before the Indiana Supreme Court on this case. The author would give a special acknowledgement to the Brief of this Amicus party and its authors who provided valuable assistance in the preparation of this Article.

30. The framing of these two sides is expressed well in the Court's statement of contentions on appeal:

Laird contends that Amoco failed to show that (1) it was not economically feasible for Laird to identify the location of the oil fields other than by Clendenning's map, or (2) the oil reserves information could have been created by means other than Amoco's business operations. Thus, Laird reasons, Amoco failed to establish that the information was not "readily ascertainable by other proper means," a requisite statutory element for trade secret protection.

Amoco urges that the oil reserve information highlighted on Clendenning's map is a trade secret. Amoco argues that IND. CODE § 24-2-3-2, the definitional component of the Indiana Uniform Trade Secrets Act, unambiguously sets forth in part that a trade secret refers to information not known to and "not being readily ascertainable" through proper means by others who can obtain economic value from its disclosure or use. Thus, Amoco asserts, because Laird could have duplicated the reserve site information only by considerable expenditure of time, effort, and expense, the information contained on the

The Indiana Supreme Court recognized this as an issue of greater importance than its definitional status would suggest. Quoting from *The Uniform Trade Secrets Act: The States' Response*,³¹ the Court agreed that "[t]he definitional section of the UTSA does a great deal more than provide definitions. It is substantive in nature and actually sets forth the elements of what constitutes a violation of the statute through its definitions of improper means, misappropriation, person, and trade secret."³² The Court also recognized the sound discretion of the trial court to grant or deny a preliminary injunction, and the proper abuse standard for its review.³³ The issue, thus framed, focused on the trial court's finding of sufficient evidence to support its conclusion that the information gathered by Amoco and transferred to the Clendenning map that was given to Laird was in fact protectable as a "trade secret" under Indiana Code section 24-2-3-2.

In tackling this issue, the Supreme Court first decided that the statutory language in question is ambiguous, thereby justifying its judicial construction.³⁴ It did so without reference to any common usage or dictionary definitions of "readily ascertainable" and without reference to the Commissioner's Comments to the UTSA which are instructive on the meaning and coverage of this term:

Information is readily ascertainable if it is available in trade journals, reference books or published materials. Often, the nature of a product lends itself to being readily copied as soon as it is available on the market. On the other hand, if reverse engineering [i.e. recreating the information] is lengthy and expensive, a person who discovers the trade secret through reverse engineering can have a trade secret in the information obtained from reverse engineering.³⁵

Rather, the Court reasoned that the phrase "not being readily ascertainable" was ambiguous in view of its "apparent susceptibility to more than one interpretation."³⁶ This was based, at least in part, on the fact that Amoco and Laird disagreed as to its coverage of the information on the Clendenning map. The

map was not readily ascertainable and therefore qualifies as a trade secret.

Amoco Prod. Co., 622 N.E.2d at 918.

31. Linda B. Samuels & Bryan K. Johnson, *The Uniform Trade Secrets Act: The States' Response*, 24 Creighton L. Rev. 49, 54 n.1 (1990).

32. *Id.*

33. *Id.* at 919 (citing *Harvest Ins. Agency v. Inter-Ocean, Ins. Co.*, 492 N.E.2d 686, 685 (Ind. 1986)).

34. *Id.* at 919-20 (citing *Superior Constr. Co. v. Carr*, 564 N.E.2d 281, 284 (Ind. 1990); *Community Hosp. of Anderson and Madison County v. McKnight*, 493 N.E.2d 775, 777 (Ind. 1986); *Hinshaw v. Board of Comm'rs of Jay County*, 611 N.E.2d 637, 638 (Ind. 1993); *P.B. v. T.D.*, 561 N.E.2d 749, 750 (Ind. 1990)).

35. Unif. Trade Secrets Act § 1, 14 U.L.A. 437 comment at 439 (1979).

36. *Amoco Prod. Co.*, 622 N.E.2d 912, 920.

Court further cited to text book and other references to "trade secrets" as being "heavily fact-specific," "elusive," and "extraordinarily difficult" to define.³⁷

Yet to be seen is whether this finding of statutory ambiguity is justified and whether it is received by other courts and commentators. The question remains unanswered since disagreement of the parties to this appeal can be viewed not as ambiguity in the statute, but rather as a dispute over its application to the facts of this case. If the Court's reasoning is followed in other jurisdictions with similar versions of the UTSA, precedential value of *Amoco Production Co. v. Laird* should be sufficient to avoid parallel or conflicting constructions of this same language by other courts.

The Indiana Supreme Court proceeded to discount prior Indiana cases addressing trade secret law under the Indiana UTSA as "factually divergent" and offering "limited guidance in determining the trade secret status of information under present circumstances."³⁸ It noted the Court of Appeals' reliance on the judicially-created standard of "economic infeasibility" first appearing in *Xpert Automation System Corp. v. Vibromatic Co., Inc.*³⁹ The Court then reviewed the foundation in *Xpert*, which relied on the prior cases of *Kozuch v. CRA-Mar Video Ctr., Inc.*,⁴⁰ and *Fleming Sales Co., Inc. v. Bailey*,⁴¹ for this theory, and concluded that *Xpert* "distorts the content in both. *Kozuch* and *Fleming* fail to provide a sound precedential basis for an economic infeasibility standard that *Laird*, relying heavily on *Xpert*, would have us acknowledge."⁴² Perhaps in

37. *Id.* at 921 (citing 1 MELVIN F. JAGER, *TRADE SECRETS LAW* § 5.01 (1992 Revision), quoting *Lear Siegler, Inc. v. Ark-Ell Springs, Inc.*, 569 F.2d 286, 288 (3rd Cir. 1978); 2 RUDOLPH CALLMAN, *THE LAW OF UNFAIR COMPETITION, TRADEMARKS, AND MONOPOLIES* § 14.06, 14-35 (4th ed. 1992); James Chapman, *California Uniform Trade Secrets Act: A Comparative Analysis of the Act and the Common Law*, 2 *COMPUTER & HIGH-TECHNOLOGY L.J.* 389, 392 (1986); *RESTATEMENT OF TORTS* § 757, Comment b (1939); Alois Valerian Gross, Annotation, *Trade Secrets*, 59 A.L.R.4th 641, § 2[a] (1988); J. Henderson, *The Specifically Defined Trade Secret: An Approach to Protection*, 27 *SANTA CLARA L. REV.* 537, 551 (1987)).

38. *Id.* at 923.

39. *Xpert*, 569 N.E.2d 351. Amoco's assessment of the Court of Appeals decision in *Laird v. Amoco* is informative on this point.

[T]he Court of Appeals distorted the clear meaning of "not being readily ascertainable" by endorsing a dual standard which requires the plaintiff to show that (1) it would be economically infeasible for the defendants to acquire the same information through other means and (2) there is evidence indicating that the information at issue could not have been created by any means other than plaintiff's business operations.

Amoco Prod. Co., 622 N.E.2d 912, 924.

40. 478 N.E.2d 110 (Ind. Ct. App. 1985).

41. 611 F. Supp. 507 (N.D. Ill. 1985).

42. *Id.* at 926. See generally Brief of Amicus Curiae Indianapolis Bar Assoc. Patent, Trademark and Copyright section at 7-10, *Amoco Prod. Co. v. Laird*, 622 N.E.2d 912 (Ind. 1993) (No. 25505-9310-CV-1144) (suggesting how the Court of Appeals was led astray in its reasoning from *Xpert*).

The court based its holding in *Amoco Prod. Co. v. Laird* on its earlier "reasonable means" standard created in *Xpert Automation Systems Corp. v. Vibromatic Co., Inc.*, (1991) Ind. App., 569

order to avoid further erosion of the public policies favoring trade secret protection underlying the Indiana UTSA, the Supreme Court did not rest with a simple rejection of an “economic infeasibility” standard based on case law precedent alone. Instead, it denounced the standard as deriving “no support from the plain language of either the Indiana Uniform Trade Secrets Act or the UTSA.”⁴³ It also held that

[a] defendant’s economic capacity to obtain information by other proper means is thus a notion extraneous to either statute Thus, the overlay of an economically infeasible standard upon the UTSA’s readily ascertainable standard is clearly inconsistent with the definitional elements of “trade secret” contained in the model statute endorsed in toto by our legislature. Economic infeasibility thus would alter Indiana’s Uniform Trade Secrets Act by having it mean what it does not say.⁴⁴

Still not satisfied, the Indiana Supreme Court further assailed an “economic infeasibility” standard as “inconsistent with apparent legislative intent”

N.E.2d 351: “Thus, it is clear that information which is discoverable by reasonable means cannot be a trade secret.” *Id.* at 569 N.E.2d at 355. This unfortunate and incorrect characterization of the proper standard (“readily ascertainable”) resulted from the *Xpert Automation Systems* court’s: (1) reliance on a discredited opinion of another Court of Appeals decision, *Steenhoven v. College Life Insurance Co.*, (1984), Ind.App., 460 N.E.2d 973; and, (2) oversimplification of the holding of a *pre*-UTSA decision of the Supreme Court in *Woodward Insurance, Inc. v. White* (1982), Ind., 437 N.E.2d 59, 68, as discussed *infra*.

The opinion in *Steenhoven v. College Life Ins. Co.* has been identified as causing the legislature of the sixth largest economic power in the world, California, to revise its version of the UTSA. Pooley, *The History of the California Trade Secrets Act*, 1 SANTA CLARA COMPUTER & HIGH-TECH. L.J. 193 (1985) (underlining added) (footnote included). Likewise, in Jager’s treatise *TRADE SECRETS LAW* (Clark Boardman), he states: “The Indiana Trade Secrets Act was construed in *Steenhoven v. College of Life Insurance Co.* . . . It is difficult to discern from the Act any legislative basis for this court-drawn distinction between lists of a wide group of customers and a small fixed group of customers.” JAGER, *TRADE SECRETS LAW* § 3.04 at 3-50. Thus, *Steenhoven* and its progeny have been criticized as being a departure from the accepted interpretation of the UTSA.

The *Xpert Automation Systems* court also oversimplified the holding in *Woodward Insurance*, stating: “In *Woodward Insurance, Inc. v. White* (1982), Ind., 437 N.E.2d 59, 68, the Supreme Court held that a policyholder list could not be considered a trade secret where the information on the list was available from other sources.” *Xpert Automation Systems*, 569 N.E.2d at 354. This is *not* the holding in *Woodward Insurance*. Instead, the Supreme Court merely applied the proper standard of review in affirming the trial court’s findings of fact. . . . Moreover, *Woodward Insurance* involved an alleged misappropriation occurring *prior* to the September 1, 1982 enactment of Indiana’s UTSA. I.C. 24-2-3-8. Since the UTSA expressly “displaces all conflicting law of this state pertaining to the misappropriation of trade secrets. . .”, I.C. 24-3-3-1(c), *Woodward Insurance* cannot be relied upon in interpreting the statute. The *Xpert Automation Systems* court’s reliance on *Woodward Insurance* is misplaced, and therefore the *Laird* court’s reliance on *Xpert Automation Systems* is similarly misplaced.

43. *Amoco Prod. Co.*, 622 N.E.2d 912, 926.

44. *Id.* at 927.

underpinning the Indiana Act and the UTSA as originally promulgated and adopted with varying modifications by thirty-nine jurisdictions in this country.⁴⁵ The Court cited case law from these other UTSA jurisdictions for their absence of any reliance on “economic infeasibility” and for their assistance in what information is properly seen as “readily ascertainable” under statute.⁴⁶

In concluding this analysis, the holding of the Court is not only historically significant, but also foreshadows the standard to be applied in Indiana courts in the future. This standard reads as follows.

Although the standard utilized by other jurisdictions to determine “not being readily ascertainable” varies, we find no case holding that “not being readily ascertainable” adheres when measures required to duplicate or acquire information are so prohibitively burdensome as to be “economically infeasible”. An economic infeasibility standard in trade secrets law not only would be unique to Indiana but also would be singularly extreme in its demand that the effort required to duplicate or acquire alleged trade secret information be not merely considerable or significant but so burdensome as to be a virtual economic impossibility.

We thus find that, consistent with the interpretation of the UTSA in other jurisdictions, where the duplication or acquisition of alleged trade secret information requires a substantial investment of time, expense, or effort, such information may be found “not being readily ascertainable” so as to qualify for protection under the Indiana Uniform Trade Secrets Act. Therefore, the trial court’s finding that methods of acquiring the information pertaining to the location of the Indiana oil reserve sites “were not simple or easy to accomplish, and are expensive to develop,” Record at 173L, is sufficient to support its conclusion that such information was not readily ascertainable and thus entitled to trade secret protection.⁴⁷

The Indiana Supreme Court could have ended its consideration of the appeal at this point. It did not. The reasoning which followed, albeit dicta, underscores the Court’s view of the correctness of the trial court’s findings based on the facts of this case. It also provides some guidance for future triers of fact.⁴⁸ In particular, the Court dispelled the thought, as argued by Laird, that a “could have” test based on hindsight would excuse trade secret misappropriation under the circumstances. It also followed the law of other jurisdictions in reasoning

45. See also MELVIN F. JAGER, *TRADE SECRETS LAW* § 3.04, at 3-30, -31 (1993).

46. *Id.* at 928.

47. *Amoco Prod. Co.*, 622 N.E.2d 912, 928.

48. *Id.*

that a trade secret may include elements, which taken separately are “readily ascertainable,” but taken together qualify for trade secret protection.

Notwithstanding Amoco’s use of some information and technology residing in the public domain, Amoco’s exploratory effort was nevertheless a unique undertaking. Amoco engaged in a considerable outlay of resources of time, effort, and funding

While some tools leading to Amoco’s site discoveries were easily accessible . . . , we find that, taken together, the integration of pertinent site information and result and projections as to potential oil reserves constitutes a unique compilation of information not previously known in the marketplace. We thus agree with the trial court’s conclusion that the information generated by Amoco, later appearing on Clendenning’s map, was not readily ascertainable.⁴⁹

The Supreme Court’s dicta in this case also reflects on the burdens of going forward with evidence in trade secret cases. Initially, a plaintiff seeking relief for misappropriation of trade secrets “must identify the trade secrets and carry the burden of showing they exist.”⁵⁰ Amoco met that burden by “providing evidence sufficient to demonstrate that duplication of its trade secret information would require a substantial investment of time, expense, and effort [This justified the trial court’s findings of fact and ultimate conclusion]. Thus, the geographical information displayed on Clendenning’s map is entitled to trade secret protection.”⁵¹ It is open to speculation what evidence Laird could have presented to meet its burden of going forward. For example, if Laird cited a published study identifying the same information on the Clendenning map, albeit possibly with other potential oil reserve sites as well, would this have changed the outcome at trial or on appeal? While the Court of Appeals stated, “[w]hether or not information is misappropriated is not part of the statutory definition of trade secret,”⁵² it is difficult to accept that even under lesser facts, the method by which Laird obtained Amoco’s trade secret information would not affect the outcome. Even if Laird had submitted this evidence, however, other actions may have been available under Indiana law to compensate Amoco for its loss.⁵³

49. *Id.* at 938. The author would hope the full impact of *Amoco v. Laird* in directing future courts in applying the Indiana UTSA is not undercut by the Supreme Court’s stress on the “unique” nature of Amoco’s work. Many trade secrets, if not all, comprise combinations at least in part of known or available information in some manner or respect. This does not lessen their value or uniqueness as “trade secrets” under the UTSA definition.

50. *Id.* at 938-37 (citing *Diodes, Inc. v. Franzen*, 67 Cal. Rptr. 19 (Cal. Ct. App. 1968); *Boeing Co. v. Sierracin Corp.*, 738 P.2d at 665, 674 (Wash. 1987)).

51. *Id.* at 939.

52. *Laird v. Amoco*, 604 N.E.2d 1249, 1254 (Ind. Ct. App. 1992).

53. The Illinois version of the UTSA is relevant on this point. By dropping the UTSA term “independent” as a modifier of “economic value” and defining a trade secret as information

In closing, the Indiana Supreme Court harkened back to policies underlying trade secrets law as promoting "[t]he maintenance of standards of commercial ethics and the encouragement of invention"⁵⁴ In this case, the Court found that "[t]he initial identification of significant oil reserve locations, though not strictly a new invention, product, or technology, represents the unique discovery of previously unknown deposits of a valuable natural resource. As such, we find that protection of such a discovery is consistent with the policies underpinning trade secrets law."⁵⁵ Accordingly, transfer was granted and the judgment of the trial court affirmed. Some indication of the unanimity of the Indiana Supreme Court on these issues is seen in the fact that all Justices concurred without opinion.

III. CONCLUSION

This Article is not intended as an exhaustive analysis of the matters discussed, or a comprehensive study of all issues or considerations underlying the definition of "trade secrets" under the Indiana UTSA. Rather, the intent is to report on an exciting survey period for Indiana trade secrets law. Only time will tell how favorable the *Amoco Production Co. v. Laird* decision is received, and its effectiveness in guiding Indiana trial courts in the future. In any event, a clear expression by Indiana's highest court on this most important Act was long awaited. Indiana needs a strong, predictable and enforceable trade secret law in order to attract new high technology companies, while keeping the ones it has. Stable trade secret law will also work to encourage investment in Indiana-based research and development efforts, to protect the interests of companies and individuals alike who have or develop such new ideas, and to maintain and foster commercial morality in this state.

"sufficiently secret to derive economic value, actual or potential, from not being generally known to others," Illinois focuses on the secrecy of the information sought to be protected. ILL. ANN. STAT. ch. 765, para. 1065/2 (Smith-Hurd 1993).

54. Citing *Kewanee Oil Co. v. Bicron Corp.*, 416 U.S. 470, 481 (1974) and *Metallurgical Indus. Inc v. Fourtek, Inc.*, 790 F.2d 1195, 1201 (5th Cir. 1986).

55. *Amoco Prod. Co.*, 622 N.E.2d at 940.

SURVEY OF RECENT LABOR AND EMPLOYMENT LAW DEVELOPMENTS FOR SEVENTH CIRCUIT PRACTITIONERS

TIM A. BAKER*

INTRODUCTION

The field of labor and employment law was a hotbed of activity during the 1993 survey period, with important developments in both the legislative and judicial arenas. The highlights of these developments include a clarification of the standard of proof in sexual harassment cases, increased use of the “after-acquired evidence” defense, enactment of the Family and Medical Leave Act of 1993, and growing judicial application of the exclusivity provisions of Indiana’s worker’s compensation statute.

This Article focuses on the most significant labor and employment law developments during the survey period. It does not, however, discuss every important ruling or legislative change; instead, this Article is a summary and analysis of key developments affecting labor and employment law practitioners in the Seventh Circuit.

I. TITLE VII

A. *Standard of Proof in Harassment Cases*

The U.S. Supreme Court’s decision in *Harris v. Forklift Systems, Inc.*¹ addressed whether conduct must seriously affect an employee’s psychological well-being or lead the employee to suffer injury to be actionable as “abusive work environment” harassment. This issue had been resolved differently among the circuit courts of appeal, with the Seventh Circuit requiring a showing of psychological injury.²

In *Harris*, the president of the company for which the plaintiff worked made repeated, unwanted sexual innuendos toward the plaintiff, often in front of others. Although the president later apologized and said he was only joking, the statements continued. Ultimately, the plaintiff quit and filed suit after the

* Associate, Barnes & Thornburg, Indianapolis. B.A., 1984, Indiana University; J.D., 1989, with distinction, Valparaiso University School of Law. Law clerk to The Honorable Larry J. McKinney, U.S. District Court, Southern District of Indiana, 1989-1991. The views expressed are solely those of the author.

1. 114 S. Ct. 367 (1993).

2. *Brooms v. Regal Tube Co.*, 881 F.2d 412, 419 (7th Cir. 1989). Other decisions reaching the same result include *Rabidue v. Osceola Ref. Co.*, 805 F.2d 611, 620 (6th Cir. 1986), *cert. denied*, 481 U.S. 1041 (1987), and *Vance v. Southern Bell Tel. & Tel. Co.*, 863 F.2d 1503, 1510 (11th Cir. 1989). *But see* *Ellison v. Brady*, 924 F.2d 872, 877-78 (9th Cir. 1991) (rejecting such a requirement).

president asked her whether she promised a customer sex while arranging a deal.³

The company successfully defended against the lawsuit in the lower courts by arguing that the comments did not affect the plaintiff's psychological well-being.⁴ Justice O'Connor, writing for a unanimous Court, reversed, reaffirming the standard originally set forth in *Meritor Savings Bank v. Vinson*,⁵ which outlawed discriminatory conduct sufficiently severe or pervasive to alter the conditions of the victim's employment and create an abusive work environment.⁶

In *Harris*, however, Justice O'Connor clarified that the reference in *Meritor* to discriminatory work environments that "'destroy completely the emotional and psychological stability of minority group workers'" did not "mark the boundary of what is actionable."⁷ Rather, *Meritor* merely presented some "especially egregious examples of harassment."⁸

Unfortunately, as Justice Scalia noted in his concurring opinion, *Harris* did not conclusively define what constitutes hostile work environment harassment.⁹ Justice O'Connor similarly acknowledged, "This is not, and by its nature, cannot be, a mathematically precise test."¹⁰ The Court did, however, explain that whether an environment is hostile or abusive is determined by looking at "all the circumstances," which "may include the frequency of the discriminatory conduct; its severity; whether it is physically threatening or humiliating, or a mere offensive utterance; and whether it unreasonably interferes with an employee's work performance."¹¹

Moreover, the Court explained that there is both an objective and a subjective component to this analysis. Not only must the conduct create an objectively hostile work environment, the victim must "subjectively perceive the environment to be abusive."¹² Otherwise, the conditions of employment have not actually been changed so as to create a Title VII violation. Although the plaintiff's psychological well-being is relevant to determining the subjective component of the claim, it is merely one factor to be considered and psychological injury is not required.¹³ Thus, *Harris* eases the burden on plaintiffs in Title VII cases by avoiding the necessity of proving psychological injury.

3. *Harris*, 114 S. Ct. at 369.

4. *Id.* at 369-70.

5. 477 U.S. 57 (1986).

6. *Harris*, 114 S. Ct. at 370.

7. *Id.* at 371 (quoting *Meritor*, 477 U.S. at 66).

8. *Id.*

9. *Id.* at 372.

10. *Id.* at 371.

11. *Id.*

12. *Id.* at 370.

13. *Id.*

B. Burden-Shifting Analysis

In *St. Mary's Honor Center v. Hicks*,¹⁴ the Supreme Court revisited the landmark 1973 decision of *McDonnell Douglas Corp. v. Green*,¹⁵ which established the oft-used "burden shifting" analysis for proving intentional employment discrimination in the absence of direct proof.¹⁶ In *Hicks*, a correctional officer who alleged that his demotion and discharge were racially motivated made a prima facie showing of discrimination.¹⁷ In response, the employer claimed that the adverse employment actions resulted from the severity and number of the plaintiff's rules violations.¹⁸ The district court found the reasons offered by the employer were not the real reasons for the plaintiff's discharge.¹⁹ This finding was based on evidence that other employees were not similarly disciplined for rules violations and that the plaintiff's supervisor manufactured a final verbal confrontation with the plaintiff in order to provoke him into threatening the supervisor.²⁰

The district court nevertheless found in the employer's favor, concluding that, although the plaintiff had proven a systematic attempt to terminate him, there was no proof of racial motivation rather than something innocuous such as a personality conflict. The Eighth Circuit Court of Appeals, however, concluded that the plaintiff was entitled to judgment as a matter of law.²¹

Reversing this decision, Justice Scalia's majority opinion emphasized that the defendant's burden was one of production only, and that the ultimate burden of persuading the trier of fact remains at all times with the plaintiff:

[T]he Court of Appeals' holding that rejection of the defendant's proffered reasons *compels* judgment for the plaintiff disregards the fundamental principle of Rule 301 that a presumption does not shift the burden of proof, and ignores our repeated admonition that the Title VII plaintiff at all times bears the 'ultimate burden of persuasion.'²²

14. 113 S. Ct. 2742 (1993).

15. 411 U.S. 792 (1973).

16. As stated in *McDonnell Douglas*, and reaffirmed in *Texas Dep't of Community Affairs v. Burdine*, 450 U.S. 711 (1983), the plaintiff has the burden of proving by a preponderance of the evidence a prima facie case of discrimination. Upon making this showing, the burden shifts to the defendant to articulate some legitimate, non-discriminatory reason for the at-issue employment decision. If such a showing is made, the plaintiff then has the opportunity to prove by a preponderance of the evidence that the legitimate reason offered by the defendant was not its true reason, but was a pretext for discrimination.

17. *Hicks*, 113 S. Ct. at 2747.

18. *Id.*

19. *Id.* at 2748.

20. *Id.*

21. *Id.*

22. *Id.* at 2749.

On the basis of *Hicks*, therefore, the falsity of an employer's explanation alone is not enough to compel judgment for the plaintiff. Rather, the burden rests with the plaintiff to affirmatively prove discrimination while disproving all of the employer's proffered reasons. A spirited dissent authored by Justice Souter labeled the majority's scheme of proof as "unfair and unworkable."²³ It may be premature to call the scheme set forth in *Hicks* unworkable. At a minimum, *Hicks* clarifies that the burden of proof remains on the plaintiff at all times, but it also leaves in question precisely how plaintiffs can disprove all explanations offered by employers in justifying employment decisions.

C. No-Dating Policies

Some employers have policies prohibiting employees from dating one another. A Seventh Circuit decision issued during the survey period—*Sarsha v. Sears, Roebuck & Co.*²⁴—reveals the inherent problems associated with such policies. A review of the facts in *Sarsha* is necessary in order to understand these problems.

Kenneth Sarsha, a male operating manager of an Illinois Sears store, was dating Rebecca Schaertl, a subordinate female employee. The store manager, Gary Taylor, learned of this relationship and after consulting with the company's regional office discharged Sarsha.²⁵ The decision to discharge Sarsha was based primarily upon four seemingly solid pieces of evidence. First, two unsigned letters, purportedly written by employees at the store, complained about a previous affair Sarsha had with a Sears security officer. Second, in response to these letters the former regional personnel manager, Allen Zimmerman, had a meeting with Sarsha and, according to a memo documenting the meeting, told Sarsha of Sears' long-standing practice against managers dating employees and warned that Sarsha would be terminated if he had a future relationship with a subordinate. Third, the store manager, Taylor, wrote to Zimmerman and told him that on two occasions he had informed Sarsha of this policy. Finally, a surveillance report confirmed that the subordinate employee, Schaertl, had spent an evening with Sarsha at his home.²⁶

Based upon this evidence, Sears discharged Sarsha but not Schaertl. Sarsha responded by claiming discrimination on the basis of his age and sex.²⁷ Sears successfully moved for summary judgment before the trial court. The issue on

23. *Id.* at 2757.

24. 3 F.3d 1035 (7th Cir. 1993).

25. *Id.* at 1037.

26. *Id.* at 1039-40.

27. Although this case involved both age and sex discrimination claims, no-dating policies typically raise sex discrimination issues and therefore this case is addressed under the Title VII heading.

appeal was whether Sarsha created a genuine issue of fact concerning the sincerity of the stated reasons for his discharge.²⁸ This decision provides excellent guidance for practitioners facing a similar issue.

Sarsha convinced the appellate court that a genuine issue existed on his age claim based upon several factors. First, Sarsha established that the claimed no-dating policy was not in writing. Second, Sarsha obtained deposition testimony from a previous manager of the store who said he never had heard of a policy relating to dating. Third, Sarsha submitted an affidavit stating that he met his second wife while both were employed at Sears and that Sears threw a party for the couple prior to their marriage.²⁹ Finally, Sarsha denied being told that dating a subordinate violated company policy and claimed he never received a copy of the Zimmerman memo.³⁰

Based upon this evidence, the Court of Appeals concluded that genuine issues of material fact existed as to whether Sears had a policy against dating and as to whether Sarsha was warned that dating Schaertl would present a problem. This decision underscores the importance of having policies in writing and of enforcing them uniformly. As the *Sarsha* court concluded, "[w]hen the existence of a uniform policy or practice is in doubt, it cannot serve as a reason for discharging [an employee]."³¹ The decision also suggests that had Sarsha actually received a copy of the memorandum purporting to set forth his conversation with Zimmerman, the evidence that Sarsha had been warned against dating subordinates would have been stronger.

The *Sarsha* decision does not mean that no-dating policies are unlawful, even if, under the policy, the employer only disciplines supervisors. In fact, the Seventh Circuit affirmed the dismissal of Sarsha's sex discrimination claim stating "Sears is entitled to enforce a no-dating policy (if one exists) against supervisors, who by virtue of their managerial positions are expected to know better, rather than subordinates."³² Rather, the decision serves as a timely reminder about the usefulness and desirability of such policies.

D. Miscellaneous

The following decisions issued during the survey period, although not capable of being classified under a single heading, nevertheless are important:

- (1) Although the filing of an EEOC complaint is an activity protected by Title VII, "the EEOC filing does not create the right to fail to

28. *Sarsha*, 3 F.3d at 1038.

29. *Id.* at 1040.

30. *Id.* at 1040-41.

31. *Id.* at 1040.

32. *Id.* at 1042.

perform assigned work, miss work, leave work without permission, or to do or fail to do any number of activities that would be legitimate reasons for dismissing any employee.”³³

(2) Absent direct evidence of discrimination, word-of-mouth hiring does not compel an inference of intentional discrimination, at least where this is the cheapest and most efficient method of recruitment.³⁴

(3) Plaintiffs in Title VII cases are entitled to backpay for time they are off of work as a result of job-related emotional distress.³⁵

II. THE CIVIL RIGHTS ACT OF 1991³⁶

A. Retroactivity

There were a number of decisions regarding the Civil Rights Act of 1991 (“1991 Act”) during the survey period, most notably ones concerning whether the provisions of this legislation should be applied retroactively to conduct occurring before the Act was signed into law.³⁷ The most important of these decisions for Seventh Circuit practitioners is *Mojica v. Gannett Co.*³⁸ in which the full Seventh Circuit held that the 1991 Act does not apply retroactively to cases that were pending before the district court, but had not yet gone to trial, at the time the law went into effect. The 7-4 decision, with one judge concurring, reaffirms two separate Seventh Circuit panel decisions that held the 1991 Act does not apply to cases pending on appeal when the law went into effect.

Judge Manion, writing for the majority in *Mojica*, said the two previous panel decisions addressing retroactivity—*Moze v. American Commercial Marine Service Co.*³⁹ and *Luddington v. Indiana Bell Telephone Co.*⁴⁰—“remain the law of [the] circuit, and . . . stand independently in their precedential value.”⁴¹

33. *Mack v. County of Cook*, 827 F. Supp. 1381, 1387 (N.D. Ill. 1993).

34. *Equal Employment Opportunity Comm’n v. Consolidated Serv. Sys.*, 989 F.2d 233 (7th Cir. 1993).

35. *Townsend v. Indiana Univ.*, 995 F.2d 691 (7th Cir. 1993).

36. Pub. L. No. 102-166, 105 Stat. 1071 (codified as amended in scattered sections of 2 U.S.C., 16 U.S.C., 29 U.S.C., and 42 U.S.C. (1991)) [hereinafter 1991 Act].

37. The Act was signed into law by President Bush on Nov. 21, 1991. The Act states that except as otherwise specifically provided, “this Act and the amendments made by the Act shall take effect upon enactment.” § 402(a). Despite this language, the Act does not explain whether it applies to cases pending on the date or cases filed after the effective date claiming discrimination that occurred prior to the Act’s effective date.

38. 7 F.3d 552 (7th Cir. 1993).

39. 963 F.2d 929 (7th Cir. 1992), *cert. denied*, 113 S. Ct. 207 (1992), *reh. denied*, 113 S. Ct. 644 (1992).

40. 966 F.2d 225 (7th Cir. 1992).

41. *Mojica*, 7 F.3d at 558.

Judge Manion then borrowed upon these cases' reasoning in concluding that it would be improper and unfair to apply the 1991 Act to conduct that occurred before the law's effective date.⁴² In his dissent, Judge Cummings noted the plaintiff's allegation of national origin discrimination was unlawful under both Title VII of the Civil Rights Act of 1964 and 42 U.S.C. § 1981 and therefore the 1991 Act did not identify new conduct as illegal.⁴³

B. Individual Liability

The Civil Rights Act of 1991 has also rekindled the argument concerning whether individuals can be held personally liable for employment discrimination under the Age Discrimination in Employment Act (ADEA)⁴⁴ and Title VII. Although the Seventh Circuit has not ruled directly on this question,⁴⁵ several district courts in this Circuit have addressed the issue with mixed outcomes.

The decision which probably is most frequently cited in resolving this issue is *Miller v. Maxwell's International, Inc.*,⁴⁶ a divided Ninth Circuit Court of Appeals case issued during the survey period rejecting individual liability. Although *Miller* is a Ninth Circuit case, and therefore is not binding in the Seventh Circuit, the frequency with which this decision has been cited by district courts in the Seventh Circuit reflects *Miller's* importance.⁴⁷

42. *Id.* at 558-60.

43. *Id.* At the time of publication of this article, two cases presenting this issue also had been argued before the U.S. Supreme Court: *Landgraf v. USI Film Products*, 968 F.2d 427 (5th Cir. 1992), *cert. granted, in part*, 113 S. Ct. 1250 (1993); and *Harvis v. Roadway Express*, 973 F.2d 490 (6th Cir. 1992), *cert. granted, in part*, 113 S. Ct. 1250 (1993). The federal appellate courts had split on this issue. The Fifth, Sixth, Seventh, Eighth, Eleventh, and D.C. Circuit Courts of Appeal have ruled that the relevant portions of the 1991 Act apply prospectively, whereas the Ninth Circuit Court of Appeals held the 1991 Act does have retroactive application. *See Johnson v. Uncle Ben's Inc.*, 965 F.2d 1363 (5th Cir. 1992); *Vogel v. City of Cincinnati*, 959 F.2d 594 (6th Cir. 1992); *Mojica v. Gannett Co.*, 7 F.3d 552 (7th Cir. 1993) (*en banc*); *Fray v. Omaha World Herald Co.*, 960 F.2d 1370 (8th Cir. 1992); *Baynes v. AT&T Technologies, Inc.*, 976 F.2d 1370 (11th Cir. 1992); *Gersman v. Group Health Ass'n*, 975 F.2d 886 (D.C. Cir. 1992); and *Reynolds v. Martin*, 985 F.2d 470 (9th Cir.), *reh'g denied*, 994 F.2d 690 (9th Cir. 1993). The Indiana Court of Appeals, in *Perry v. Stitzer Buick*, 604 N.E.2d 613, 616 (Ind. App. 1992), followed a line of federal appellate court opinions which, at that time, had unanimously rejected retroactive application of the 1991 Act.

44. 29 U.S.C.A. § 621 *et seq.* (West 1985 & Supp. 1992).

45. In *Gaddy v. Abex Corp.*, 884 F.2d 312 (7th Cir. 1989), the Seventh Circuit upheld a finding of personal liability against a supervisor as well as the employer, but made no express holding on the individual liability issue.

46. 991 F.2d 583 (9th Cir. 1993).

47. As the Seventh Circuit often has stated, district courts in this circuit are required to give "respectful consideration" to decisions from other federal circuits absent Seventh Circuit precedent. *See, e.g., Colby v. J.C. Penney Co., Inc.*, 811 F.2d 1119, 1123 (7th Cir. 1987).

The plaintiff in *Miller* alleged sex and age discrimination in employment and named the owners and managers of the restaurant where she worked as individual defendants.⁴⁸ The district court dismissed the case and the court of appeals affirmed. Borrowing upon the district court's reasoning, the appellate court observed that while the term "employer" in Title VII and the ADEA is defined to include any agent of the employer, "[t]he obvious purpose of this [agent] provision was to incorporate respondeat superior liability into the statute."⁴⁹ In addition, the court observed that because Title VII and the ADEA limit liability to employers with fifteen and twenty or more employees, respectively, "it is inconceivable that Congress intended to allow civil liability to run against individual employees."⁵⁰

The dissent argued that individual liability was supported by the amendments to Title VII contained in the Civil Rights Act of 1991.⁵¹ These amendments permit for the first time compensatory and punitive damages for intentional violations of Title VII. The dissent found this change significant and concluded that it may pave the way for individual liability under Title VII (although the allegations in *Miller* arose prior to the passage of the 1991 Act).⁵²

Declining to follow (or substantively discuss) the majority's holding in *Miller*, Chief Judge Moran permitted the plaintiff to pursue her individual Title VII claims in *Vakharia v. Swedish Covenant Hospital*.⁵³ In *Vakharia*, the court stated, "if the people who make discriminatory decisions do not have to pay for them, they may never alter their illegal behavior and the wrongdoers may elude punishment entirely, while the victim may receive no compensation whatsoever."⁵⁴

In contrast, in *Pelech v. Klaff-Joss, LP*,⁵⁵ the court stated "we respectfully disagree" with Judge Moran's holding and instead relied in part upon *Miller* in concluding that the individual defendants were not "employers" for Title VII purposes.⁵⁶ Specifically, the *Pelech* court quoted *Miller* when it observed, "[i]f Congress decided to protect small entities with limited resources from liability,

48. *Miller*, 991 F.2d at 584.

49. *Id.* at 587 (quoting *Miller v. Maxwell's Int.*, 1990 U.S. Dist. LEXIS 10479 at 4 (N.D. Cal. Jan. 17, 1990)).

50. *Id.*

51. *Id.* at 589. The dissent also observed that in *Shager v. Upjohn Co.*, 913 F.2d 398, 404 (7th Cir. 1990), Judge Posner cited with approval to *House v. Cannon Mills Co.*, 713 F. Supp. 159 (M.D. N.C. 1988), which found agents could be individually liable under the ADEA (although Judge Posner did not so hold).

52. *Id.*

53. 824 F. Supp. 769 (N.D. Ill. 1993)

54. *Id.* at 786.

55. 828 F. Supp. 525 (N.D. Ill. 1993).

56. *Id.* at 529.

it is inconceivable that it intended to allow civil liability to run against individual employees”⁵⁷

The *Miller* decision also was considered at length in *U.S. Equal Opportunity Commission v. AIC Security Investigations*,⁵⁸ in which the court upheld a finding of personal liability against an individual decision maker under the Americans With Disabilities Act.⁵⁹ Rather than following *Miller*, however, the *AIC Security* case expressly agreed with Judge Moran’s decision in *Vakharia* that “if the person most responsible for invidious discriminatory actions (that is, the employee who actually discriminates) were shielded from personal liability, that person may never be sufficiently punished or deterred.”⁶⁰

The foregoing holdings reveal that the question of individual liability of supervisors for discriminatory conduct will remain unsettled in this Circuit until the Seventh Circuit Court of Appeals decides this topic.⁶¹ As a result, this issue is likely to be litigated frequently and practitioners must be familiar with the competing arguments.

III. AGE DISCRIMINATION

A. Willfulness/Proxy

A number of courts, including the U.S. Supreme Court, issued important decisions concerning the ADEA⁶² during the survey period. Perhaps the most significant of these decisions is *Hazen Paper Co. v. Biggins*.⁶³ In *Hazen Paper*, the plaintiff was fired by his employer at age sixty-two, a few weeks before his pension benefits would have vested. The plaintiff sued his former employer claiming violations of the ADEA and the Employee Retirement Income Security Act (ERISA).⁶⁴ The employer claimed the plaintiff was fired for doing business with competitors. The jury returned a verdict in the plaintiff’s favor on both his ADEA and ERISA counts, but the trial judge granted the employer’s motion for judgment notwithstanding the verdict (JNOV) on the jury’s finding

57. *Pelech*, 828 F. Supp. at 529 (quoting *Miller*, 991 F.2d at 587).

58. 1993 WL 427454 (N.D. Ill. 1993).

59. 29 U.S.C. § 12101 *et seq.*

60. *AIC Security*, 1993 WL 427454 at 8.

61. *See also* *Hangebrauck v. Deloitte & Touche*, 1992 WL 348743 (N.D. Ill. Nov. 9, 1992) (holding individual capacity suits under Title VII are improper and rejecting the argument that the 1991 Act changed the law on this front); *Zakutansky v. Bionetics Corp.*, 806 F. Supp. 1362 (N.D. Ill. 1992) (rejecting personal liability of corporate agents under Title VII); *Weiss v. Coca-Cola Bottling Co.*, 772 F. Supp. 407 (N.D. Ill. 1991) (accord).

62. 29 U.S.C.A. § 621 *et seq.* (West 1985 & Supp. 1992).

63. 113 S. Ct. 1701 (1993).

64. 29 U.S.C. § 1001 *et seq.* (1988).

that the employer willfully violated the ADEA. The court of appeals affirmed, but reversed the trial judge's grant of JNOV.⁶⁵

The Supreme Court vacated the appellate court's decision and in so doing reaffirmed its own prior decision in *Trans World Airlines v. Thurston*.⁶⁶ In *Thurston*, the Supreme Court held that an employer willfully violates the ADEA if it either knew or showed reckless disregard for the matter of whether the conduct at issue was prohibited.⁶⁷ Since *Thurston* was decided, a number of circuits have declined to apply this standard where age was involved in the employment decision on an ad hoc, informal basis rather than through a formal policy.⁶⁸

The Supreme Court used its *Hazen Paper* decision as an opportunity to provide guidance on the proper application of the willfulness standard. The Court stated:

It is not true that an employer who knowingly relies on age in reaching its decision invariably commits a knowing or reckless violation of the ADEA . . . If an employer incorrectly but in good faith and nonrecklessly believes that the statute permits a particular age-based decision, then liquidated damages should not be imposed.⁶⁹

The Court further stated that once an employee has shown that the violation was willful, the employee does not have to also "demonstrate that the employer's conduct was outrageous, or provide direct evidence of the employer's motivation, or prove that age was the predominant rather than a determinative factor in the employment decision."⁷⁰

The *Hazen Paper* decision also clarified the circumstances under which an employer's interference with the vesting of pension benefits may violate the ADEA. This clarification was necessary because, as the Court stated, "some language in our prior decisions might be read to mean that an employer violates the ADEA whenever its reason for firing the employee is improper in any respect."⁷¹

65. *Hazen Paper*, 113 S. Ct. at 1704-05.

66. 469 U.S. 111 (1985).

67. *Id.* at 126.

68. *Hazen Paper*, 113 S. Ct. at 1709.

69. *Id.*

70. *Id.* at 1710. Also during the survey period, a district court in Illinois denied summary judgment in an age discrimination case where the employer, citing budgetary restraints and the need to keep salaries low, would not consider job applicants with extensive prior experience. *EEOC v. Francis W. Parker Sch.*, 1993 WL 106523 (N.D. Ill. 1993). The court held that this practice unlawfully screens out persons based on their age. The validity of this decision clearly is called into question by the Supreme Court's decision in *Hazen Paper*.

71. *Hazen Paper*, 113 S. Ct. 1707 (emphasis in the original).

The Court held that “an employer does not violate the ADEA just by interfering with an older employee’s pension benefits that would have vested by virtue of the employee’s years of service.”⁷² Although recognizing that pension status may be a proxy for age, the court held that it is not necessarily so.⁷³ It is significant that in *Hazen Paper* the plaintiff’s vesting rights were tied completely to years of service, rather than to age. This fact obviously limits the scope of the decision on the pension issue. Moreover, *Hazen Paper* should not be understood to mean that an employer lawfully may fire an employee for the purpose of preventing pension benefits from vesting. As the Supreme Court noted, such conduct is actionable under § 510 of ERISA.⁷⁴

B. Derogatory Remarks

In *Monaco v. Fuddruckers, Inc.*,⁷⁵ the Seventh Circuit held that evidence of age-based derogatory remarks in the workplace is not necessarily sufficient to survive a motion for summary judgment under either the direct or indirect method of proof. In *Monaco*, a skilled butcher was told on several occasions by his manager that he was getting “too old” and that he should quit. He also was asked to train a younger employee, who the butcher claimed replaced him after he quit following reductions in the butcher’s wages and benefits.⁷⁶

The Seventh Circuit first held that the age-based remarks did not constitute direct evidence of discrimination because there was no connection between the managers’ remarks and the reductions in the plaintiff’s wages and benefits.⁷⁷ Rather, the decision to reduce wages and benefits was made by Fuddruckers’ central corporate management and applied to all of its skilled butchers and hourly employees.⁷⁸ The plaintiff’s attempt to utilize the indirect, burden-shifting method of proof also failed. The Seventh Circuit held that although there are “numerous ways to prove pretext,” the plaintiff relied only upon the evidence used to establish his *prima facie* case.⁷⁹ “This he may not do,” the court said.⁸⁰

72. *Id.* at 1707-08.

73. *Id.* at 1707.

74. *Id.*

75. 1 F.3d 658 (7th Cir. 1993).

76. *Id.* at 659.

77. *Id.* at 660.

78. *Id.*

79. *Id.* at 661.

80. *Id.*

C. *Post-retirement Income*

In *Moskowitz v. Trustees of Purdue University*,⁸¹ the Seventh Circuit held that post-retirement income is not compensable under the ADEA. The plaintiff in *Moskowitz*, a tenured biology professor, was forced to retire at age seventy. Although the ADEA permits universities to require professors to retire at seventy, the plaintiff argued that before his retirement he was denied research funds, facilities, and travel grants because of his age. The district court dismissed this portion of the plaintiff's claim on the ground that the ADEA limits damages to lost earning and benefits.⁸² The issue on appeal was whether post-retirement income is within the scope of remedies the ADEA authorizes.

Judge Posner, writing for a unanimous Seventh Circuit panel, acknowledged that the ADEA allows courts to grant "such legal or equitable relief as may be appropriate to effectuate the purposes' of the law."⁸³ However, Judge Posner noted that the ADEA incorporates the remedies of the Fair Labor Standards Act (FLSA)⁸⁴ and therefore "the natural way to take this language is as referring to amounts such as wages or benefits that the employer should have given the employee but did not because of the latter's age."⁸⁵ The court reasoned that this would exclude claims for post-retirement income which is in effect "consequential damages."⁸⁶ The *Moskowitz* decision thus makes it clear that the Seventh Circuit will strictly limit the types of legal relief that may be recovered under the ADEA.

D. *Size of Employer*

*Rogers v. Sugar Tree Products, Inc.*⁸⁷ provides useful guidance on two separate issues relevant to whether an employer has the required twenty employees to be covered by the ADEA. First, addressing whether individuals are employees or independent contractors, the Seventh Circuit held that although control is important in making this determination, the "nature of the relationship" between the individual and the company also must be examined.⁸⁸ Second, the *Rogers* court discussed the circumstances under which two companies will be considered to be a single employer. On this issue, the court held that two companies will not be considered a single employer for ADEA purposes simply

81. 5 F.3d 279 (7th Cir. 1993).

82. *Id.* at 281.

83. *Id.* at 283 (quoting 29 U.S.C. § 626(b) (1988)).

84. 29 U.S.C. § 201 *et seq.* (1988).

85. *Id.*

86. *Id.*

87. 7 F.3d 577 (7th Cir. 1993).

88. *Id.* at 581.

because they are owned by the same individual, who also serves as president of the two companies.⁸⁹ Thus, in *Rogers* the two companies were held to be distinct employers.

IV. ERISA⁹⁰

In a decision some attorneys likely will welcome, a 5-4 majority of the Supreme Court held in *Mertens v. Hewitt Associates*⁹¹ that pension plan recipients cannot recover money damages from outside advisors such as actuaries, accountants, or attorneys. The case stemmed from actuarial assumptions that were not changed after numerous employees of a steel company elected to take early retirement. The plaintiffs sought monetary damages against the retirement plan's actuary alleging that the failure to recalculate the assumptions caused the plan to be inadequately funded.⁹²

Justice Scalia, writing for the majority, stated that although Sections 409(a) and 502(a)(2) of ERISA provide for damages and other "appropriate relief," these provisions are limited by their terms to fiduciaries.⁹³ The plaintiffs in *Mertens* argued that damages were appropriate under Section 502(a)(3), which authorizes a plan beneficiary, participant, or fiduciary to bring a civil action "to obtain other appropriate equitable relief." Specifically, the plaintiffs contended that requiring the actuary to make the plan whole for losses resulting from the alleged participation in the breach of fiduciary duty would constitute other appropriate relief within the meaning of this provision.⁹⁴

Rejecting this argument, Justice Scalia first noted that "while ERISA contains various provisions that can be read as imposing obligations upon nonfiduciaries, including actuaries, no provision explicitly requires them to avoid participation (knowing or unknowing) in a fiduciary's breach of fiduciary duty."⁹⁵ While acknowledging that it never had interpreted the precise phrase "other appropriate equitable relief" in ERISA, the Court noted similar language in other statutes had been understood "to preclude 'awards for compensatory and punitive damages.'"⁹⁶ The majority refused to give "a strained interpretation to § 502(a)(3)" to carry out ERISA's purpose of protecting plan participants and

89. *Id.* at 583.

90. Employee Retirement Income Security Act, 29 U.S.C. § 1001 *et seq.* (1988).

91. 113 S. Ct. 2063 (1993).

92. *Id.* at 2065-66.

93. *Id.* at 2066-67.

94. *Id.* at 2067-68.

95. *Id.* at 2067 (footnote omitted).

96. *Id.* at 2068 (quoting *United States v. Burke*, 112 S. Ct. 1867 (1992)).

beneficiaries.⁹⁷ However, Justice White's dissent argued that a compensatory monetary award was appropriate because such relief was available in the equity courts under the common law of trusts, the principles of which are to be used to construe ERISA and the scope of the term "appropriate equitable relief."⁹⁸

The full Seventh Circuit Court of Appeals expressed a similar divergence of opinion in a recent case concerning retirement benefits. In *Bidlack v. Wheelabrator Corp.*,⁹⁹ the court held that if language in a collective bargaining agreement is vague or ambiguous on the existence of a promise of lifetime health benefits for retirees, a jury may examine extrinsic evidence to determine the parties' intent.¹⁰⁰

Bidlack involved a class action in which retired employees alleged that a collective bargaining agreement conferred upon them lifetime rights to certain health benefits. The district court dismissed the action on the basis that the collective bargaining agreement revealed no intention on the part of the employer to provide the lifetime benefits the plaintiffs sought. On appeal, the full court voted to hear the case pursuant to Circuit Rule 40(f) to reexamine the holding in *Senn v. United Dominion Industries, Inc.*¹⁰¹

The issue on appeal in *Bidlack* was whether extrinsic evidence can be used to show entitlement to lifetime health benefits despite the absence of any such contractual language explicitly providing for these benefits. The majority held that if collective bargaining agreements are "silent" on the duration of health benefits, extrinsic evidence could not be used to show a perpetual entitlement.¹⁰² The *Bidlack* court further stated, however, that "the agreements are not silent on the issue; they are merely vague."¹⁰³ Therefore, the court ruled, a jury should hear the extrinsic evidence and decide the issue. "The contract in this case is ambiguous and both sides are poised to present testimony and documents that they claim will disambiguate it. We think they should be allowed to do so."¹⁰⁴

Judge Easterbrook's dissent, in which three other judges joined, proclaimed, "Uncertainty now reigns."¹⁰⁵ The dissent warned that because collective bargaining arrangements may last for decades and govern the affairs of many,

97. *Id.* at 2071.

98. *Id.* at 2073-74.

99. 993 F.2d 603 (7th Cir. 1993) (en banc).

100. *Id.* at 609.

101. *Id.* at 604-05. *Senn v. United Dominion Indus., Inc.*, 951 F.2d 806 (7th Cir.), *reh'g denied*, 962 F.2d 655 (1992), *cert. denied*, 113 S. Ct. 2992 (1993).

102. *Bidlack*, 993 F.2d at 608.

103. *Id.*

104. *Id.* at 609.

105. *Id.* at 620.

“it will be possible to come up with evidence that someone thought that arrangements under the existing agreement would last forever.”¹⁰⁶

V. FAIR LABOR STANDARDS ACT¹⁰⁷

The Seventh Circuit upheld the Department of Labor’s rules for calculating overtime for employees whose work hours fluctuate in *Condo v. Sysco Corp.*¹⁰⁸ The regulation at issue in *Condo* was 29 C.F.R. § 778.114 which provides that a salaried employee whose hours of work fluctuate from week to week may reach a mutual understanding with his employer that he will receive a fixed amount as straight-time pay for whatever hours he is called upon to work in a workweek, whether few or many, and that he will be compensated for his overtime work at a rate of 1/2 of his regular hourly pay. The regular hourly pay is calculated by dividing the employee’s regular weekly pay by the total number of hours worked during the week.¹⁰⁹

The plaintiff in *Condo*, who worked as a chauffeur and in the company’s mailroom, asserted that all hours worked in excess of forty hours per week should have been paid at a rate of one and one-half times his regular weekly rate as the FLSA¹¹⁰ generally requires. The company, however, asserted that its salary agreement complied with § 778.114 of the labor regulations.¹¹¹ The Seventh Circuit agreed and, more importantly, upheld the validity of the regulations.

The court observed that “[u]nder a system . . . set forth in § 778.114 an employee who receives a fixed weekly salary for ‘all hours worked’ receives the one and one-half times his regular rate for his overtime hours” as required by the FLSA.¹¹² It is true, the court noted, that as the number of hours an employee works increases, his regular rate of pay decreases and thus he will receive less overtime pay per hour. This, however, does not conflict with the FLSA so long as the regular rate within each workweek does not change and the rate of pay for each overtime hour is one and one-half times that regular rate.¹¹³

106. *Id.* at 618.

107. 29 U.S.C. § 201 *et seq.* (1988) [hereinafter FLSA].

108. 1 F.3d 599 (7th Cir. 1993).

109. *Id.* at 601-02.

110. 29 U.S.C. §§ 201-219 (1988).

111. *Condo*, 1 F.3d at 600-01.

112. *Id.* at 605.

113. *Id.*

VI. WARN ACT

Although there were few significant decisions affecting the Worker Adjustment and Retraining Notification Act (WARN Act)¹¹⁴ during the survey period, one case of first impression deserves mention. In *Jurcev v. Central Community Hospital*,¹¹⁵ the Seventh Circuit held that the WARN Act does not require an employer to show it had insufficient assets to remain open for the statutorily-required sixty-day period.¹¹⁶ In *Jurcev*, Central Community Hospital failed to give sixty days' notice of closure when it abruptly lost its primary source of funding, and a class of employees who lost their jobs brought suit alleging a WARN Act violation.¹¹⁷

The plaintiffs asserted that in order for the defendants to rely upon the "unforeseen business circumstances" exception to the WARN Act, the hospital had to show not only an unforeseeable circumstance, but also that closure could not be delayed for sixty days. The Seventh Circuit disagreed, stating, "Neither the WARN Act nor its accompanying regulations saddle an employer with the burden of making such a showing."¹¹⁸ In reaching this holding, the court found "no significance" to legislative history relied upon by the plaintiffs.¹¹⁹ Accordingly, *Jurcev* lessens the burden facing employers in attempting to utilize the WARN Act's unforeseen business circumstances exception.

VII. AFTER-ACQUIRED EVIDENCE

One of the most active areas in employment litigation recently has involved the use of after-acquired evidence to defeat employees' discrimination claims. The Seventh Circuit issued two decisions on this topic in 1992¹²⁰ and revisited this issue during the survey period in *Kristufek v. Hussmann Foodservice Co.*¹²¹

Plaintiff Kristufek claimed he was fired because of his age and also in retaliation for opposing the discharge of plaintiff McPherson, who also alleged she was terminated because of her age. Kristufek had two hurdles to overcome. First, he lied about his educational qualifications when he applied for the job, although this fact was not discovered until after his lawsuit was commenced. Second, the plaintiff never presented his retaliation claim to the EEOC. The

114. 29 U.S.C. §§ 2101-2109 (1988).

115. 7 F.3d 619 (7th Cir. 1993).

116. *Id.* at 625.

117. *Id.* at 620-21.

118. *Id.* at 625.

119. *Id.*

120. *See infra* notes 125-26.

121. 985 F.2d 364 (7th Cir. 1993).

district court declined to dismiss the retaliation claim for failure to exhaust administrative remedies and a jury returned a verdict in the plaintiffs' favor. However, the judge subsequently granted the defendant's JNOV motion on the basis that the fraudulent conduct barred Kristufek from any recovery.¹²²

The *Kristufek* court reversed the district court's grant of JNOV on the resume fraud issue. The appellate court held, "A discriminatory firing must be decided solely with respect to the known circumstances leading to the discharge. The deterring statutory penalty is for retaliatory firing, the character of which is not changed by some after discovered alternate reason for discharge which might otherwise have been used, but was not."¹²³ The court reached this decision despite the fact that the employment application form warned that misstatements or omissions of material facts may be cause for immediate dismissal. The court gave no significance to this language, stating "[m]ay be' is not 'will be,' and is not enough to avoid the proven charge of a retaliatory firing."¹²⁴ The Seventh Circuit's decision in *Kristufek* is somewhat contrary to its prior decisions in *Washington v. Lake County*¹²⁵ and *Reed v. Amax Coal Co.*,¹²⁶ in which it held generally that resume fraud may be a defense if the employer can show it would have fired the employee upon learning of the misstatements.¹²⁷

Although the Supreme Court was expected to address the proper role of after-acquired evidence during the survey period, that Court dismissed an appeal from the decision in *Milligan-Jensen v. Michigan Technological University* on August 10, 1993.¹²⁸ *Milligan-Jensen* held that evidence of employee misconduct acquired after the plaintiff's discharge can be a complete defense to discrimination claims.¹²⁹ The dismissal, which resulted when the parties settled the case,¹³⁰ leaves a split in the circuits as to the proper role of this "after-acquired evidence" in discrimination litigation. This is yet another issue of which practitioners must be aware and which undoubtedly will arise again.

On a related note, the Seventh Circuit decision in *Stromberger v. 3M Co.*¹³¹ makes it difficult for at-will employees to maintain fraud claims against

122. *Kristufek*, 985 F.2d at 365-67.

123. *Id.* at 369 (citations omitted).

124. *Id.*

125. 969 F.2d 250 (7th Cir. 1992).

126. 971 F.2d 1295 (7th Cir. 1992).

127. *Washington*, 969 F.2d at 256.

128. 975 F.2d 302 (6th Cir. 1992), *cert. granted*, 113 S. Ct. 2991, *cert. dismissed*, 114 S. Ct. 22 (1993).

129. *Id.* at 305.

130. See T. Baker, *Unsettled Issue*, 79 A.B.A. J. 39 (1993) (quoting defendant's counsel that case was "amicably resolved," but declining to give additional details of the settlement due to a confidentiality agreement).

131. 990 F.2d 974 (7th Cir. 1993).

their employers. In connection with his employer's downsizing in mid-1989, the plaintiff and other employees in *Stromberger* were offered a voluntary severance plan to encourage them to find employment elsewhere. Shortly before the deadline for accepting the severance package, plaintiff's supervisor indicated that the sales quota would be raised significantly and a failure to meet this quota would result in the salesmen being fired without benefits. Fearing he could not make this increased quota, the plaintiff resigned.¹³²

Later, however, the plaintiff discovered that not all salesmen in his group had been given the high quota and that even those salesmen who failed to make their lower quotas had not been fired. The plaintiff responded by suing the company for age discrimination and fraud, although the age claim was dismissed as untimely.¹³³ The plaintiff's fraud claim also failed on the ground that, as an at-will employee, if the employer wanted to get rid of him it could have fired him outright. The Court observed that the plaintiff could not be defrauded of "a job to which he had no right."¹³⁴ The court suggested, without deciding, that the case might have been different if the plaintiff could show that he would not have quit or been fired had the company not made the misrepresentations.¹³⁵

VIII. ARBITRATION AND MEDIATION

Arbitration-related decisions are occurring with increasing frequency. This survey period was no exception. Among the most significant cases in the arbitration arena was *Farrand v. Lutheran Brotherhood*¹³⁶ in which the Seventh Circuit declined to read *Gilmer v. Interstate/Johnson Lane Corp.*¹³⁷ broadly enough to require arbitration of an employment dispute involving a dealer registered with the National Association of Securities Dealers (NASD).

The plaintiff in *Lutheran Brotherhood* filed an age discrimination suit against his employer. However, the plaintiff previously had signed an agreement with his employer in which he agreed to arbitrate "any dispute, claim or controversy that may arise between me and my firm . . . that is required to be arbitrated under the rules . . . of the organizations with which I register."¹³⁸ The plaintiff was registered with the NASD. The foregoing language from the arbitration agreement was the same language at issue in *Gilmer*, although in that case the plaintiff was registered with the New York Stock Exchange (NYSE) rather than the NASD.

132. *Id.* at 975-76.

133. *Id.* at 976.

134. *Id.* at 977.

135. *Id.* at 978.

136. 993 F.2d 1253 (7th Cir. 1993), *reh'g denied*, at 1255 (*per curiam*).

137. 111 S. Ct. 1647 (1991).

138. *Lutheran Brotherhood*, 993 F.2d at 1254.

Based upon the arbitration agreement, Lutheran Brotherhood successfully argued before the district court that the employment dispute was subject to arbitration. The district court based its decision to compel arbitration upon *Gilmer*, which strongly endorsed the arbitration process.¹³⁹ The Seventh Circuit, however, interpreted *Gilmer* more narrowly, stating, “*Gilmer* did not establish a grand presumption in favor of arbitration; it interpreted and enforced the texts on which the parties had agreed.”¹⁴⁰ The Seventh Circuit then observed that while the NYSE rules expressly referenced arbitration of employment disputes, the NASD rules lacked similar language.¹⁴¹

The *Lutheran Brotherhood* decision thus slows the trend toward arbitration of employment disputes, at least in the Seventh Circuit. The end result is that, at a minimum, arbitration agreements must expressly state the parties’ intention to arbitrate employment disputes.¹⁴²

Another important survey period decision involving arbitration agreements is *International Union of United Automobile, Aerospace and Agriculture Implement Workers of America v. Randall Division of Textron, Inc.*,¹⁴³ which involved a dispute over whether an arbitration clause was of indefinite duration. In *Textron*, Randall took over operations of a manufacturing facility in Morristown, Indiana, and continued producing the same products as the facility’s prior owner. Accordingly, the union that had represented the production, laboratory, and maintenance workers at the facility since 1978 asked Randall to recognize it as the employees’ exclusive bargaining representative. Randall refused and unfair labor practice charges were filed.

When the smoke cleared, an agreement was reached that the charges would be withdrawn, that Randall would not be required to bargain with the union until eighteen months after Randall received clear title to the manufacturing facility, and that six months after receiving clear title Randall would be required to arbitrate discharge grievances. The agreement did not, however, state the duration of the obligation to arbitrate. Shortly after the eighteen-month period expired, Randall withdrew recognition of the union on the ground that it had a good faith doubt as to the union’s majority status. Randall subsequently refused to arbitrate any of the grievances filed by the union.

139. *Id.*

140. *Id.* at 1255.

141. *Id.* at 1254.

142. It is important to keep in mind that *Lutheran Brotherhood* and *Gilmer* both involved arbitration of disputes in the securities industry. *Gilmer* did not resolve the question of whether arbitration of employment disputes outside the securities industry may be compelled in light of the Federal Arbitration Act’s exclusionary clause, 9 U.S.C. § 1 (1988). See *Gilmer*, 111 S. Ct. at 1651 n.2.

143. 5 F.3d 224 (7th Cir. 1993).

The union responded by filing an action for breach of contract under § 301 of the Labor-Management Relations Act of 1947.¹⁴⁴ The district court concluded "that the arbitration clause was of indefinite duration and therefore terminable at will by either party."¹⁴⁵ On appeal, the union argued in part that Randall's obligation to arbitrate grievances was enforceable for a "reasonable amount of time," which would be until bargaining commenced.¹⁴⁶ The Seventh Circuit agreed, concluding that the district court "should have determined the reasonable duration of Randall's obligation to arbitrate discharge grievances."¹⁴⁷ The appellate court then remanded the case for a determination of whether Randall's arbitration obligation terminated when the eighteen-month bargaining moratorium expired or when the parties actually commenced bargaining.¹⁴⁸

It sometimes seems arbitration decisions are beyond reproach, but *Carpenter Local 1027 v. Lee Lumber and Building Material Corp.*¹⁴⁹ provides a useful example of an arbitrator exceeding his authority. In *Lee Lumber*, the union filed a grievance challenging the termination of an employee. The company agreed to reinstate the employee provided the employee return to work within seven days. The company and the union agreed that the union would notify the employee of his reinstatement and make sure that he returned to work on time. The employee, however, was out of town and the union either was unable or unwilling to locate him. The employee returned to work after nine days, the company refused to reinstate him, and the union filed a grievance on the matter. The issue before the arbitrator was whether the company had just cause to discharge the employee, and if not, what the remedy should be.

The arbitrator held that the employee was discharged without just cause because he could not be held responsible for knowing that he had to return to work within seven days. In addition, although the union had agreed to tell the employee of his reinstatement, the arbitrator stated that it is the company that reinstates not the union. Therefore, the arbitrator ordered the employee reinstated with back pay. However, the arbitrator ordered the union to reimburse the company the back pay to which the employee was entitled. The union responded by challenging this decision in federal court.

The *Lee Lumber* court first correctly observed that "[j]udicial review of arbitration awards is limited."¹⁵⁰ The Seventh Circuit also observed that the

144. 29 U.S.C. § 185 (1988).

145. *Textron*, 5 F.3d at 226.

146. *Id.* at 229.

147. *Id.* at 230.

148. *Id.*

149. 2 F.3d 796 (7th Cir. 1993).

150. *Id.* at 797 (citing *United Steelworkers of Am. v. Enterprise Wheel & Car Corp.*, 363 U.S.

collective bargaining agreement at issue did not explicitly set forth the remedies that the arbitrator could impose. The court noted, however, that the collective bargaining agreement did limit the arbitrator to deciding only the grievance submitted.¹⁵¹ Based upon this limitation, Judge Manion held, "Not only does the collective bargaining agreement strongly imply that the arbitrator could not impose the reimbursement remedy he imposed in this case, we think it is clearly implausible to suppose the parties ever contemplated that remedy."¹⁵² In reaching this decision, the court also referenced potential conflicts that such a remedy could pose between a union's "own interests and its duty to fairly represent its employees."¹⁵³

The *Lee Lumber* decision shows that while judicial review of arbitration is strictly limited, the Seventh Circuit will intervene when an arbitrator's decision is clearly beyond the authority granted by the collective bargaining agreement.

One final arbitration-related decision—*Chrysler Motors Corp. v. International Union*¹⁵⁴—is significant because of the aggressive and successful strategy pursued by the company in that case. In *Chrysler Motors*, an employee was discharged after sexually assaulting a female co-worker. A grievance was filed protesting the discharge and during the arbitration of this grievance Chrysler presented evidence that on four other occasions the employee intentionally grabbed and/or pinched female co-workers. At the time of the employee's discharge, Chrysler was unaware of these additional incidents. Focusing only on the incident known at the time of the discharge, the arbitrator found the discharge to be too severe and ordered the employee reinstated with a 30-day suspension.¹⁵⁵ Unlike the union in *Lee Lumber*, Chrysler was unsuccessful in its attempt to challenge this decision in subsequent proceedings in federal court.

Undeterred, however, Chrysler responded by sending the employee a check for one day's pay, along with a letter explaining that he was being reinstated for one day and simultaneously dismissed based upon the four additional incidents of misconduct that were discovered after the employee's initial discharge. The union responded by asking that the district court hold Chrysler in contempt for attempting to evade the court's order. The district court declined to do so and the Seventh Circuit affirmed.

593, 597 (1960)).

151. *Id.* at 798.

152. *Id.* at 799.

153. *Id.* As the court pointed out, had the union known it could have been liable for back pay, the temptation could have existed to give "short shrift" to the employee's grievance or to defend itself at the employee's expense since the union could not be liable if the employee was not entitled to backpay. *Id.*

154. 2 F.3d 760 (7th Cir. 1993).

155. *Id.* at 762.

In so doing, the Seventh Circuit first reviewed the arbitrator's decision to verify that he had not considered the additional incidents of misconduct.¹⁵⁶ Once this hurdle was cleared, the court held it was "entirely appropriate" for Chrysler to reinstate the employee and then, based upon evidence obtained during its post-discharge investigation, again discharge him.¹⁵⁷ As the court observed, simply because an arbitration award required reinstatement of a discharged employee does not mean that the employee "has been granted perpetual job security."¹⁵⁸ The *Chrysler Motors* decision thus represents a bold litigation strategy which, when successfully implemented, may bar meaningful reinstatement of employees who otherwise successfully challenge their discharge. The success of this strategy is dependent upon employee misconduct which: (1) the company was unaware of at the time of the discharge; (2) the arbitrator did not consider in reaching a decision; and (3) independently supports the discharge.¹⁵⁹ Another factor that undoubtedly played a role in the court's decision was the employee's egregious misconduct, which included grabbing a female co-worker's breasts and proclaiming, "Yup, they're real."¹⁶⁰ Because of the possible liability for back pay and the potential for being held in contempt of court, use of this strategy should be carefully considered.

IX. NATIONAL LABOR RELATIONS BOARD

A. *Electromation*

The hottest topic concerning the National Labor Relations Act (the "Act")¹⁶¹ during the survey period was "Electromation," referring to the National Labor Relations Board's ("NLRB" or "Board") decision in *Electromation, Inc.*¹⁶² The Board in *Electromation* held that joint labor-management committees were "labor organizations" under Section 2(5) of the National Labor

156. *Id.* at 763.

157. *Id.* at 764

158. *Id.* at 763 (quoting *Chicago Newspaper Guild v. Field Enter., Inc.*, 747 F.2d 1153, 1156 (7th Cir. 1984)).

159. This strategy is not limited to discharge cases. If the necessary elements are present, suspensions and other forms of discipline also could be supported.

160. *Id.* at 761.

161. 29 U.S.C. § 141 *et seq.* (1988).

162. 309 NLRB 990 (1992). Although this case was decided in 1992, it was issued late in the survey period (Dec. 16, 1992), and therefore was not addressed in last year's Survey Issue. Moreover, the decision has had a major effect during the survey period, as employers, unions, and the courts have attempted to determine what conduct is permissible in light of *Electromation*. At the time of publication, *Electromation* had been appealed to and orally argued before the Seventh Circuit, but a decision had not yet been handed down.

Relations Act and that management illegally dominated and interfered with these committees in violation of Section 8(a)(2) and (1) of the Act.¹⁶³ Although *Electromation* arguably deals a blow to management's efforts to form joint labor-management committees, the decision contains fact-specific language limiting the breadth of its holding, and Board Member Oviatt's separate concurrence stressed the "wide range of lawful activities" he viewed as being "untouched" by the decision.¹⁶⁴ As pointed out, the joint labor-management committees at issue in *Electromation* involve "innovative employee involvement programs directed to improving efficiency and productivity."¹⁶⁵ The programs, however, have come under attack from organized labor, who view them as an attempt to thwart union organization efforts.¹⁶⁶

In *Electromation*, a non-union manufacturer of electrical components and parts with a work force of approximately 200 people set up five "action committees" to discuss issues involving wages, bonuses, incentive pay, attendance programs, and leave policy. Employees signed up to participate on these committees, which also included management representatives. Shortly after these committees began meeting, a union made a recognition demand. Management responded by withdrawing its participation on the committees, but the company told the employees they could continue to meet if they so desired.¹⁶⁷ Two of the committees continued meeting on company premises; a third committee, formed to address attendance and bonus issues, wrote a proposal which, after revision, was deemed fiscally sound by the company's controller. The proposal was not presented to the company's president, however, because of the intervening union campaign.¹⁶⁸

The four Board members who decided *Electromation* unanimously agreed that the action committees were labor organizations under Section 2(5) of the Act and that the company illegally dominated and interfered with these committees in violation of Section 8(a)(2) and (1) of the Act. Each Board member wrote separately, however, to express his particular view of what conduct is actionable. Pursuant to *Electromation*, a committee is "a labor organization if (1) employees participate, (2) the organization exists, at least in part, for the purpose of 'dealing with' employers, and (3) these dealings concern 'conditions of work' or concern other statutory subjects, such as grievances, labor disputes, wages, rates of pay, or hours of employment."¹⁶⁹ The decision also suggests, although it expressly

163. *Id.*

164. *Id.* at 1004-05.

165. *Id.* at 1004.

166. 245 *Daily Labor Rep.* AA-2 (Dec. 18, 1992) (quoting Teamsters President Ron Carey).

167. *Electromation*, 309 NLRB at 991.

168. *Id.*

169. *Id.* at 994.

does not decide, that the committee must have the purpose of representing the employees.¹⁷⁰

Provided that the labor committees at issue are found to be a labor organization, the next issue is whether management illegally dominates or interferes with these committees in violation of Section 8(a)(2) and (1) of the Act. Illegal domination was found in *Electromation* because management: (1) created the committees; (2) "drafted the written purposes and goals of the Action Committees, which defined and limited the subject matter to be covered by each Committee;" (3) "determined how many members would compose a committee . . . , and appointed management representatives to the committees to facilitate discussions;" and (4) "permitted employees to carry out the committee activities on paid time."¹⁷¹ Under these circumstances, Chairman Stephens observed that "employees essentially were presented with the Hobson's choice of accepting the status quo, which they disliked," or participating in the committees.¹⁷²

The legality of joint labor-management committees remains uncertain in the wake of *Electromation*, partly because the decision is largely limited to its facts.¹⁷³ Adding to the confusion are the decision's three separate concurrences. Although legal scholars have expressed different views on the decision's significance,¹⁷⁴ at a minimum *Electromation* portends that management-sponsored programs in both the union and non-union setting will come under increased scrutiny. One example of this is *DuPont Co.*,¹⁷⁵ a post-*Electromation* decision in which the Board ordered DuPont—which has an organized labor force—to disband several joint labor-management committees.

As in *Electromation*, the Board in *DuPont* found that the committees at issue fell within Section 2(5)'s definition of labor organization. In reaching this conclusion, the Board found that the employee-members of the committee acted in a representational capacity, but again declined to decide whether the committee must have the purpose of representing the employees.¹⁷⁶ The Board also found that the company dominated the committees largely because: (1) the company retained veto power over any action the committee wished to take; (2) a management member played a key role in establishing the agenda for and

170. *Id.* at 994 n.20 (stating it is "unnecessary to the disposition of this case" to reach this issue, but observing that Member Devaney believes such a finding is essential).

171. *Id.* at 997-98.

172. *Id.* at 998.

173. For example, Member Devaney wrote, "I do not pass on the status of any other arrangement." *Id.* at 999.

174. 245 *Daily Labor Rep.* A-14-17 (Dec. 21, 1992) (quoting various individuals, including Professor Charles Morris, who says the decision is not a setback for labor-management teamwork efforts).

175. 311 NLRB No. 88 (1993).

176. *Id.* at 2 n.7.

conducting each meeting; and (3) the company determined how many employees would serve on each committee.

At the same time, however, the Board found that quarterly safety conferences involving "brainstorming sessions" did not constitute direct dealing with employees in violation of Section 8(a)(5). This finding was supported by the fact that the company: (1) mentioned the union at each conference and told employees that the conference was not a union matter; and (2) told employees it recognized the union's role and that bargainable issues should be handled only by the union.¹⁷⁷ Thus, although *DuPont* is an example of the Board's increased scrutiny of joint labor-management programs, the decision provides some helpful guidance in lawfully establishing and maintaining such committees.¹⁷⁸

B. Union Security Clauses

The Board's decision in *Paramax Systems Corp.*¹⁷⁹ represents a change in the law with respect to union security clauses.¹⁸⁰ *Paramax* involved a challenge to a union security clause that required employees "to continue and remain members of the Union in good standing as a term and condition of employment."¹⁸¹ The NLRB general counsel maintained that the clause violated Sections 8(b)(1)(A) and 8(b)(2) of the Act because it failed to state that the only condition of continued employment is the payment of initiation fees and dues.¹⁸²

Although the Board did not find the clause facially invalid, as the general counsel had argued, the Board concluded that the phrase "members of the Union in good standing" was ambiguous, and therefore examined whether the union was required to inform members of their actual obligations.¹⁸³ Focusing on the

177. *Id.* at 4.

178. NLRB general counsel Jerry Hunter also provided some helpful guidance for analyzing *Electromotion*-type issues in an advice memorandum issued on April 15, 1993, to all Board Regional Offices.

179. 311 NLRB No. 105 (1993).

180. A union security clause is the term used to describe a standard provision in collective bargaining agreements requiring employees to obtain and maintain membership in a union as a condition of employment. *See generally* PATRICK HARDIN, *THE DEVELOPING LABOR LAW* 1489-1566 (3d ed. 1992).

181. *Paramax*, 311 NLRB No. 105 at 1.

182. *Id.* at 2. This is the law based upon the Supreme Court's decision in *Communication Workers of Am. v. Beck*, 487 U.S. 735 (1988), which held that dissenting agency fee payers cannot be forced to contribute to union expenditures not related to collective bargaining, contract administration, or the adjustment of grievances. On a related note, on February 1, 1993, President Clinton issued Executive Order 12836, rescinding the requirement of Executive Order 12800 that employers notify their workers of their *Beck* rights. Exec. Order No. 12,836, 29 C.F.R. 470 (1993).

183. *Id.* at 7.

union's duty of fair representation, the Board found that the union "failed to take any steps" that would disabuse the employees of the belief that full union membership is required.¹⁸⁴ The Board wrote, "Specifically, we find that Respondents breached their fiduciary duty to Paramax employees by failing to inform them that their sole obligation under the union-security provision was to pay dues and fees."¹⁸⁵ As a result, the Board expressly rejected the long-standing model union security clause it announced in *Keystone Coat, Apron, & Towel Supply Co.*¹⁸⁶

Finally, the Board also stated that the new rule announced in *Paramax* will be applied "to this case and to all pending cases at whatever stage."¹⁸⁷ Based upon this retroactive application of *Paramax*, union security clauses in existing contracts should be examined to determine whether they adequately apprise employees of their Section 7 rights. If not, the union should take affirmative steps to tell its members that their sole obligation under the union-security provision is to pay dues and fees. In drafting new collective bargaining agreements, *Keystone's* model clause should be avoided and replaced with language that will remove any ambiguity about members' obligations.

X. FAMILY AND MEDICAL LEAVE ACT OF 1993

The Family and Medical Leave Act of 1993 (FMLA)¹⁸⁸ became effective for most covered employers on August 5, 1993.¹⁸⁹ The FMLA applies to all private employers with fifty or more employees for each working day during each of twenty or more calendar workweeks in the current or preceding calendar year,¹⁹⁰ and "public agencies" covered by the FLSA.¹⁹¹ For many larger employers this may be the most important legislation to take effect during the survey period.

184. *Id.* at 10.

185. *Id.*

186. 121 NLRB 880 (1958). The *Keystone* clause provided in relevant part: "It shall be a condition of employment that all employees of employer covered by this agreement who are members of the Union in good standing on the effective date of this agreement shall remain members in good standing. . . ." *Id.* at 885.

187. *Id.* at 12.

188. 29 U.S.C.A. §§ 2601 *et seq.* (West 1993 Supp). See also 29 C.F.R. Part 825 (1993) (setting forth interim final regulations from the U.S. Department of Labor. These regulations are subject to change, and, in fact, practitioners should expect that changes will occur).

189. 29 C.F.R. § 825.102. For employers with a collective bargaining agreement in effect on August 5, 1993, the FMLA became effective on the date the collective bargaining agreement terminated or on February 5, 1994, whichever was earlier.

190. 29 C.F.R. § 825.104.

191. 29 U.S.C. § 2611(4)(A).

A. Overview

Employees are not eligible to take leave unless: (1) they have worked for the employer for at least twelve months; (2) they have worked at least 1,250 hours during the preceding year; and (3) they are "employed at a worksite" where the employer employs at least fifty employees within a seventy-five-mile radius.¹⁹² The FMLA applies the requirements of the FLSA in determining hours of service, so that all hours that an employer suffers or permits an employee to work are counted toward hours of service.¹⁹³ This may include on-call time.¹⁹⁴ Employees exempt from FLSA requirements for whom no hours-worked records are kept are presumed to have met the 1,250-hour requirement unless the employer can clearly demonstrate this is not the case.¹⁹⁵

In determining whether a person is "employed" for FMLA purposes, the regulations adopt the "maintained on the payroll test."¹⁹⁶ Part-time employees and employees on leaves of absence thus would be counted as employed for each working day so long as they are on the employer's payroll for each day of the workweek. In contrast, an employee added to the employer's payroll after the beginning of a workweek, or who terminates employment prior to the end of the workweek, will not count as being employed on each working day in that workweek.¹⁹⁷

Leave taken prior to August 5, 1993, does not affect the leave to which an employee is entitled under the FMLA. The regulations make it clear that "only leave starting on and after" the effective date is considered leave that can be counted against an employee's twelve-week entitlement.¹⁹⁸

B. Serious Health Condition

The FMLA provides that an eligible employee may take leave to care for a spouse, son, daughter, or parent with a serious health condition, or because of the employee's own serious health condition.¹⁹⁹ Much of the debate surrounding the FMLA involved the uncertainty as to what constitutes a "serious health condition," which is defined to include a condition requiring in-patient care or "continuing treatment by a health care provider."²⁰⁰ The regulations provide

192. 29 U.S.C. § 2611(2). The 75-mile radius is measured based on surface miles on public roads, not "as the crow flies." 28 C.F.R. § 825.111(b).

193. 29 C.F.R. § 825.110.

194. *Id.*

195. *Id.*

196. 29 C.F.R. § 825.105.

197. *Id.*

198. 29 C.F.R. § 825.103.

199. 29 U.S.C. § 2612(a)(1).

200. 29 U.S.C. § 2611(11).

significant guidance in this area, although uncertainties remain and the regulations addressing this issue reportedly are being considered for amendment.

Where in-patient care is not involved, a serious health condition must involve absence from work (or, in the case of a family member, absence from school or incapacity in performing other daily activities) for a period of more than three days and require the continuing treatment of a health care provider.²⁰¹ The FMLA also provides for intermittent leave; therefore a serious health condition also includes treatment for a serious, chronic health condition which, if left untreated, likely would result in an absence from work of more than three days.²⁰² Prenatal care also is considered a serious health condition.²⁰³

“Continuing treatment” by a health care provider includes: (1) two or more visits to a health care provider; (2) two or more treatments by a health care practitioner on a referral from, or under the direction of, a health care provider; or (3) a single visit to a health care provider that results in a regimen of continuing treatment under the supervision of the health care provider (such as a course of medication or therapy).²⁰⁴ According to the regulations, this definition includes serious conditions that require supervision by a health care provider but do not involve continuing, active care, such as Alzheimer’s or late-stage cancer.²⁰⁵

Treatment for substance abuse also may come within the scope of the FMLA, provided a stay in an in-patient treatment facility is required. Absence because of the employee’s use of the substance, without treatment, does not qualify for leave. The FMLA regulations specifically explain that inclusion of substance abuse as a serious health condition does not prevent the employer from taking employment action against an employee who is unable to perform the essential functions of the job, provided the employer complies with the Americans With Disabilities Act and does not take action against the employee for exercising the right to take leave.²⁰⁶

C. Duration Of Leave

An eligible employee is entitled to take up to twelve weeks of leave in “any twelve-month period.”²⁰⁷ The FMLA regulations explain that employers will be allowed to choose a uniform method to compute the twelve-month period

201. 29 C.F.R. § 825.114(a)(2).

202. 29 C.F.R. § 825.114(a)(3).

203. *Id.*

204. 29 C.F.R. § 825.114(b).

205. 29 C.F.R. § 825.114(b)(3).

206. 29 C.F.R. § 825.114(c).

207. 29 U.S.C. § 2612(a)(1).

from various alternatives, including the calendar year, a fixed twelve-month period for all employees, twelve months measured forward from the first date that leave is used, and a rolling twelve-month period measured backward from the date leave is used.²⁰⁸

The FMLA provides for intermittent leave to care for a seriously ill family member or because of the employee's own serious health condition whenever "medically necessary."²⁰⁹ Addressing the topic of intermittent leave, the regulations state that there is no minimum leave duration other than the shortest period of time that the employer's payroll system uses to account for absences or use of leave.²¹⁰ Thus, presumably employees could take a series of one-hour leaves if medically necessary. The only limitation would be the FMLA's requirement that, if foreseeable, employees try to schedule the leave so as not to unduly disrupt the employer's operations. Covered employers are permitted to "dock" the pay of salaried and exempt employees for leave-related absences of less than a full day without affecting their exempt status under the FLSA.²¹¹

The FMLA entitles an employee to take a maximum of twelve weeks of leave for the birth of a child, even if the employer provides its own disability leave period. Thus, the regulations state that any period before and after birth during which a mother is not able to work for medical reasons may be considered leave for a serious health condition, despite the fact that the period after birth is also leave to care for the newborn child. In addition, the employer may require an employee to substitute accrued, paid leave for unpaid leave.²¹²

D. Benefits

The FMLA requires an employer to maintain coverage under any group health plan for the duration of leave and under the conditions coverage would have been provided if the employee had continued in employment continuously for the duration of such leave.²¹³ The regulations explain, however, that an employer is not required to provide health benefits during leave unless the employer already does so.²¹⁴

More complicated issues arise in connection with the FMLA's interplay with the Consolidated Omnibus Budget Reconciliation Act of 1985 (COBRA).²¹⁵

208. 29 C.F.R. § 825.200(b).

209. 29 U.S.C. § 2612(b)(1).

210. 29 C.F.R. § 825.203(d).

211. 29 C.F.R. § 825.206.

212. 29 C.F.R. § 825.207.

213. 29 U.S.C. § 2614(c).

214. 29 C.F.R. § 825.209.

215. Pub. L. No. 99-272, 100 Stat. 82 (1986). The interplay with other employment laws, such as the Americans With Disabilities Act, 42 U.S.C. § 12101-12213 (1988), raises a variety of

COBRA requires employers to allow employees to continue their health coverage for specific periods following a "qualifying event," such as termination from employment,²¹⁶ and also requires employers to give employees notice of their right to continue their coverage. Leave under the FMLA will not normally constitute a qualifying event because the employer expects the employee to return to work following the leave period. However, citing legislative history, the regulations explain that a qualifying event may occur when the employer knows that the employee is not returning to work after the leave.²¹⁷

One problem this presents for employers is that they may not know of the employee's plan not to return to work until the leave is concluded. Under this scenario, the employee would receive twelve weeks of employer-paid coverage in addition to eighteen months of COBRA coverage. Although the FMLA permits an employer to recover premiums it paid for maintaining health coverage during any period of unpaid leave under the Act, this is allowed only if the inability to return is not caused by the employee's serious health condition or "other circumstances beyond the employee's control."²¹⁸

E. Notice Requirements

Every employer subject to the FMLA is required to post in conspicuous places a notice explaining the FMLA's provisions and providing information concerning the procedures for filing complaints of alleged violations. Employers may duplicate the notice provided with the regulations,²¹⁹ or may obtain copies from local offices of the Wage and Hour Division. If an employer has an employee handbook discussing employee benefits or leave rights, the regulations require the handbook to incorporate information on rights and responsibilities provided under the Act.²²⁰

F. Enforcement

An employer that violates the FMLA leave provisions may be liable for damages equal to the amount of: (1) wages, salary, employment benefits, or other compensation denied to or lost by the employee by reason of the violation; or (2) where such wages, benefits, or compensation were not lost (as where the

complex issues which demand careful attention from labor and employment law practitioners.

216. For example, COBRA provides generally that an employee may elect to continue coverage for 18 months following the termination of the employee's employment. 29 U.S.C. § 1162(2)(A) (1988).

217. 29 C.F.R. § 825.209(f).

218. 29 U.S.C. § 2614(c)(2); 29 C.F.R. § 825.213.

219. 29 CFR § 825.

220. 29 C.F.R. § 825.301.

employee is wrongly denied leave and stays on the job), any actual monetary losses sustained by the employee as a direct result of the violation, up to a maximum amount of twelve weeks of the employee's wages or salary.²²¹ In addition, the FMLA also provides for an additional award of liquidated damages in an amount equal to the wages and benefits awarded (plus interest), although the court has the discretion not to award liquidated damages if the employer proves the violation was made in good faith.²²² The statute also provides for an award of attorney's fees and costs to the prevailing plaintiff.²²³

As the foregoing reveals, the FMLA dramatically changes the rules—and liabilities—governing leaves of absence in many workplaces. Many of these rules are complex and, at times, inconsistent with other federal labor laws. At a minimum, covered employers must revise their leave policies and incorporate FMLA information in their handbooks, or risk litigation.

XI. STATE LEGISLATIVE DEVELOPMENTS

Employment-related legislative activity at the state level was relatively minor during the survey period, yet a few changes are noteworthy. Perhaps most important, Indiana Code section 22-9-1-14 was added to provide that the Indiana Civil Rights Commission may award attorney's fees and costs to the prevailing party.²²⁴ This change will add an incentive for attorneys to represent plaintiffs in cases before the Commission and also raises the potential exposure of defendants in these cases. The impact of this change may be felt more by smaller employers (six²²⁵ or more employees but less than fifteen), who would not be covered by Title VII, which already provides for attorney fee awards. On a related note, Indiana Code section 22-9-1-6 was amended to extend the time for filing a complaint with the Commission from 90 to 180 days, and all references to "hearing officer" in the statute are changed to administrative law judge.

221. 29 U.S.C. § 2617(a). Interest will be added to any award under this provision. § 2617(a)(1)(A)(ii).

222. 29 U.S.C. § 2617(a)(1)(A)(iii). Note that the burden of proof on this issue is upon the employer.

223. 29 U.S.C. § 2617(a)(3).

224. This provision will automatically expire on December 31, 1994. In a related judicial development, a divided Indiana Court of Appeals held in *Indiana Civil Rights Comm'n v. Washburn Realtors, Inc.*, 610 N.E.2d 293, 297 (Ind. App. 1993) that the Commission exceeded its statutory authority by awarding emotional and punitive damages in a housing discrimination case.

225. IND. CODE § 22-9-1-3(h) (1993) defines "employer" to include most entities employing six or more persons.

XII. WORKER'S COMPENSATION

A number of decisions during the survey period affected practice and procedure in worker's compensation cases. Most significantly, a string of decisions demonstrated growing judicial application of the exclusivity doctrine. For example, in *St. Mary Medical Center v. Baker*²²⁶ an employee was injured in the course of her employment and received treatment for her injuries at the Medical Center. Traveler's Insurance, a worker's compensation carrier, paid a portion of the charges billed but disputed the validity of other charges. The Medical Center subsequently filed a state court action seeking to collect the balance directly from the employee.

The trial court dismissed the action, finding that the case should have been filed with the Worker's Compensation Board and that the court therefore lacked subject matter jurisdiction. This holding was based upon Indiana Code section 22-3-2-6 which generally excludes all rights and remedies of an employee against an employer other than those provided under the worker's compensation statute.²²⁷ However, *St. Mary's Medical Center* involved a claim by a health care provider against an employee, rather than an employee-employer dispute.

A divided court of appeals affirmed the dismissal of the complaint. Judge Staton, writing for the majority, concluded with little discussion that the dispute was among the class of issues to which the legislature had given an administrative agency exclusive and primary jurisdiction.²²⁸ Judge Baker's dissent observed that the class of issues left to the worker's compensation board "has traditionally been limited to questions of compensation arising between employees or their dependents and employers or employers' insurance companies," rather than disputes between an employee and a health care provider.²²⁹ Judge Baker's dissent notwithstanding, the holding in *St. Mary's Medical Center* broadens the worker's compensation exclusivity doctrine.

Another recent case, *Wolf Corp. v. Thompson*,²³⁰ also relied upon the exclusivity doctrine in affirming the dismissal of a complaint. In *Thompson*, the estate of a deceased employee brought a complaint that included a wrongful death action against the decedent's former employer claiming that the employer's handling of the employee's worker's compensation claim "caused the deceased severe emotional distress which caused his ulcer to burst which caused a heart attack which caused his death."²³¹

226. 611 N.E.2d 135 (Ind. Ct. App. 1993).

227. IND. CODE § 22-3-2-6 (1993)

228. *St. Mary's Medical Center*, 611 N.E.2d at 137.

229. *Id.* at 138.

230. 609 N.E.2d 1170 (Ind. Ct. App. 1993).

231. *Id.* at 1173.

The trial court granted the employer's motion to dismiss this portion of the complaint on the ground that it was barred by Indiana Code section 22-3-2-6. A unanimous court of appeals affirmed. The employee's estate argued that the case fell within the intentional tort exception to the exclusivity doctrine. The court rejected this assertion, stating "a naked allegation of an intentional tort is not enough to avoid the exclusive remedy provision of the Worker's Compensation Act."²³²

The exclusivity issue was presented in a somewhat different context in *Wolf v. Kajima International, Inc.*²³³ The central issue in *Kajima* was whether an injured employee of a subcontractor is barred from pursuing a tort action against the general contractor and owner of the plant where he was injured. The owner, Subaru-Isuzu Automotive, Inc., purchased a "wrap-around" worker's compensation policy for the general contractor, Kajima International, Inc., and the various subcontractors, including C.J. Rogers, Inc., for which Wolf worked.

After suffering an on-the-job injury, Wolf received \$148,646 in worker's compensation benefits under the wrap-around policy. Wolf then filed a negligence action against Kajima and Subaru. The trial court granted summary judgment in favor of these defendants on the ground that Subaru and Kajima should be treated as "statutory employers" because they provided worker's compensation benefits to Wolf.²³⁴ The court of appeals reversed, holding that an owner or general contractor cannot avoid potential tort liability to employees of contractors or subcontractors by purchasing worker's compensation insurance on behalf of subcontractors. "To hold otherwise would allow an owner or general contractor to voluntarily take out insurance that the law does not require and thereby secure for itself freedom from liability from negligence," the court wrote, adding that the legislature could not have intended such a result.²³⁵

The exclusivity doctrine also was applied in *The Associates Corporation of North America v. Smithley*.²³⁶ In *Smithley*, the plaintiff was discharged for dishonesty and responded by filing a lawsuit for assault and battery and defamation.²³⁷ The plaintiff's assault and battery claim alleged inappropriate sexual touchings by a co-worker, and the company responded by asserting that the cause of action was barred by the exclusivity provision of the worker's compensation statute.²³⁸ The plaintiff argued that the exclusivity provision was

232. *Id.* Ironically, Judges Staton and Baker were the concurring judges in *Thompson*.

233. 621 N.E.2d 1128 (Ind. Ct. App. 1993). This decision was adopted and incorporated by reference by the Indiana Supreme Court. *Wolf v. Kajima Int'l, Inc.*, 1994 WL 66090 (Ind. Mar. 8, 1994).

234. *Id.* at 1129.

235. *Id.* at 1132.

236. 621 N.E.2d 1116 (Ind. Ct. App. 1993).

237. *Id.* at 1118.

238. *Id.* at 1119-20.

inapplicable because the harm could not have occurred "by accident," as required by the statute, because of the repeated nature of her co-worker's conduct.²³⁹ The plaintiff also contended that the exclusivity provision would not bar a claim for negligent retention of the co-worker.²⁴⁰

The court of appeals rejected the plaintiff's arguments. Relying upon *Fields v. Cummins Employees Federal Credit Union*,²⁴¹ the court held that both the assault and battery claim and the negligent retention claim against the company were barred by the exclusivity provision of the worker's compensation statute.²⁴²

Finally, in *Weldy v. Kline*,²⁴³ the court held that an employee's death at an employer-sponsored party arose out of the course of his employment and therefore the exclusive remedy of the decedent's estate would be through worker's compensation subject to a determination on remand as to whether the employee actively participated in horseplay or was an innocent victim.²⁴⁴ Taken together, this series of cases demonstrates that Indiana courts increasingly are willing to dismiss actions based upon the worker's compensation exclusivity doctrine. Busy court dockets no doubt have contributed to this trend. Regardless of the cause, however, practitioners should be aware of this inclination and be prepared to litigate the issue more frequently in the future.

XIII. EMPLOYMENT CONTRACTS

The Indiana Court of Appeals decided several significant cases during the survey period addressing a variety of issues concerning employment contracts. Perhaps the most significant of these decisions is *Jarboe v. Landmark Community Newspapers of Indiana, Inc.*,²⁴⁵ which held that oral employment-related promises may bind employers despite Indiana's employment at will doctrine.²⁴⁶

The plaintiff in *Jarboe* alleged that he was told by his general manager that he had a one-year employment contract, that he could only be discharged for cause, and that if his performance was satisfactory he would be employed for the next year, and so on.²⁴⁷ He also allegedly was told that if his performance was unsatisfactory he would be placed on probation for thirty to sixty days and his

239. *Id.* at 1121.

240. This cause of action apparently was not clearly pleaded. *Id.*

241. 540 N.E.2d 631 (Ind. Ct. App. 1989).

242. *Smithley*, 621 N.E.2d at 1121.

243. 616 N.E.2d 398 (Ind. Ct. App. 1993).

244. *Id.* at 404-06.

245. 625 N.E.2d 1291 (Ind. Ct. App. 1993).

246. *Id.* at 1295.

247. *Id.* at 1293.

contract would be re-evaluated.²⁴⁸ The terms of the agreement never were reduced to writing.

Each year the plaintiff received favorable reviews. Upon learning that he needed surgery to replace a deteriorating knee, the plaintiff claimed that he was assured by his general manager that his job would remain open, and was told to take as long as necessary to recover.²⁴⁹ When the plaintiff was unable to return to work three months after his operation, however, his general manager allegedly told him that he was being replaced.

The plaintiff then filed suit for unjust dismissal and breach of his oral contract, and the court had to decide whether the plaintiff had an enforceable oral contract. As the court observed, the statute of frauds requires contracts that cannot be performed within one year to be reduced to writing. Accordingly, the *Jarboe* court held that the oral contract was not enforceable because the plaintiff's employment would be extended by at least a thirty-day probationary period after each year even if unsatisfactory.²⁵⁰

Undaunted, the plaintiff argued that despite the unenforceable oral contract his employer was promissory estopped from discharging him before his medical leave expired. The court agreed, citing *Eby v. York Division, Borg Warner*²⁵¹ for the proposition that application of the doctrine of estoppel is appropriate in actions where a party takes certain action to his detriment in order to avail himself of promised employment.²⁵² In *Eby*, however, the plaintiff and his wife put their Indianapolis home up for sale and moved to Florida based upon a promise that the plaintiff had a job there waiting for him. In contrast, the *Jarboe* plaintiff merely took a medical leave to have knee surgery, although this leave allegedly cost the plaintiff his job.

The facts in *Eby* are arguably more compelling for the application of the promissory estoppel doctrine. Thus, *Jarboe* suggests Indiana courts may begin applying promissory estoppel more liberally in the employment setting. The *Jarboe* decision also leaves unresolved what damages, if any, the plaintiff might be entitled to recover. In *Eby*, the plaintiff sought his moving expenses, lost wages while preparing to move (but not lost wages for lack of the job itself), and related expenses. In *Jarboe*, no similar expenses were at issue. Thus, the plaintiff presumably would be seeking lost wages up to the time that his medical leave would have expired. Recovery of these wages, however, seems somewhat inconsistent with the plaintiff's at-will employment status. Although the damages

248. *Id.*

249. *Id.*

250. *Id.* at 1294.

251. 445 N.E.2d 623, 627 (Ind. Ct. App. 1983).

252. *Jarboe*, 625 N.E.2d at 1295.

may be debatable, the lesson *Jarboe* teaches is certain: oral promises of employment may be binding even in an at-will employment setting.

In *Keating v. Burton*,²⁵³ the Court of Appeals addressed whether the parties had sufficiently agreed on the terms of the plaintiff's employment so as to create an oral employment contract. Plaintiff Sean Keating met with defendant Bryce Burton regarding the possibility of Keating working for Burton and purchasing the mechanical contracting division of Burton's Mechanical Contractors ("BMC"). The parties negotiated the proposed contract over a two-month period and Burton provided Keating with drafts of an agreement calling for a three-year term of employment.

At the parties' final meeting on this issue, however, Keating said he could not sign the agreement because he did not like the language governing termination. Nevertheless, Keating described the documents as "workable" and said he would let the attorneys work out the details.²⁵⁴ Keating thereafter began working for BMC as a contract estimator. Keating left the employ of BMC, however, after Burton curtailed Keating's estimating duties because of alleged mistakes. Keating responded by filing a breach of contract action.

The court of appeals, after addressing a separate issue involving the statute of frauds, found that the designated material evidence did not support the existence of an oral contract between the parties. Specifically, the court held, "This undisputed evidence shows that Keating and Burton did not agree to all terms of the employment agreement. Accordingly, a valid oral contract did not exist between Keating and Burton."²⁵⁵

Similarly, in *Rosi v. Business Furniture Corp.*,²⁵⁶ the plaintiff sued his former employer claiming he was owed certain commissions based upon a "Personnel Action Request" ("PAR"), which he asserted contained the parties' agreement with regard to the payment of commissions. The employer successfully moved for summary judgment on the ground that the PAR was merely an interoffice document created for the company accounting department and not an enforceable written contract. The court's unanimous decision affirmed the trial court ruling, noting that the specifically designated evidence did not support the conclusion that a contract existed.²⁵⁷ The court's decision was supported by the fact that the plaintiff was not given a copy of the PAR, he had not even seen it at the time of his hiring, the PAR was created for the benefit of

253. 617 N.E.2d 588 (Ind. Ct. App. 1993).

254. *Id.* at 590.

255. *Id.* at 592.

256. 615 N.E.2d 431 (Ind. 1993).

257. *Id.* at 435.

the accounting department, and the form and content of the document made it look like an interoffice communication.²⁵⁸

XIV. QUALIFIED PRIVILEGE

The Indiana Court of Appeals' decision in *Schrader v. Eli Lilly & Co.*²⁵⁹ discusses the circumstances under which an employer may use the qualified privilege defense against employee defamation claims. The plaintiffs in *Schrader* were five former Lilly employees who were discharged as a result of an investigation into rumors of theft at the company's Tippecanoe Laboratories facility. After these employees were terminated, rumors began circulating that they had been fired for stealing.²⁶⁰ Because of these continued rumors, the director of the Tippecanoe facility included a slide presentation in his weekly staff meeting for managers at the plant. One manager had his notes of the meeting transcribed and transmitted to various department heads, one of whom posted the typed notes on a bulletin board.²⁶¹ The notes stated in relevant part that six employees had been dismissed, but did not say that this action was taken because of theft. Rather, the notes said that the action was taken because of "loss of confidence" in the employees and further stated, "We cannot tolerate a loss of trust and honesty as a company or as individuals."²⁶²

The discharged employees subsequently brought an action for defamation and the issue on appeal was whether the slide presentation and the written notes were protected by the qualified privilege defense. The court of appeals affirmed the trial court's dismissal of the complaint to the extent it challenged the slide presentation to managers. The court held that the plaintiffs "have not shown that the slide presentation to the managers was anything other than a communication made in good faith on a subject matter in which Lilly and the managers each had an interest, that is, maintaining good employee morale and protecting high employee output."²⁶³ Therefore, the *Schrader* court held that as a matter of

258. The decision also is important because it emphasizes that parties must properly designate portions of the record to the trial court at the summary judgment stage. The plaintiff asked the trial court to reconsider its ruling on the ground that his action was not limited solely to a written contract theory and that the evidence showed an oral contract between the parties. The employer countered that the plaintiff had not designated any evidence for the court that would show that he was attempting to defeat summary judgment on the basis of an oral contract and the trial court agreed. On appeal, the court focused on the 1991 amendments to Trial Rule 56 and unanimously concluded that the plaintiff failed to designate any evidence demonstrating an oral contract for commissions. *Id.* at 434.

259. 621 N.E.2d 635 (Ind. Ct. App. 1993).

260. *Id.* at 638.

261. *Id.* at 638-39.

262. *Id.* at 639.

263. *Id.* at 642.

law the communications from Lilly to its managers fell under the scope of the qualified privilege.²⁶⁴

Lilly was not successful, however, in convincing the court of appeals that the trial court correctly applied the privilege to the bulletin board posting. First, the appellate court held that while some of the 1,500 Lilly employees at the facility may have had an interest in morale and output sufficient to justify the privilege, merely being a Lilly employee was not enough for the privilege to attach.²⁶⁵ As the court observed, some of the employees may not have had any misconceptions about why the plaintiffs were terminated and, therefore, Lilly "could not have had an interest or a duty to clarify misconceptions which did not exist."²⁶⁶ Thus, an issue of material fact existed which a jury must decide.²⁶⁷

Second, the *Schrader* court held that the evidence was sufficient to raise the possibility that Lilly "engaged in excessive publication" of the information to outside contractors and subcontractors who may have seen the bulletin board notes.²⁶⁸ "The designated matter does not indisputably show that any or all of the outside contractors or subcontractors had a corresponding interest in morale, output, or job security or that they were covered by the privilege."²⁶⁹ Therefore, a genuine issue of material fact also existed on this issue, thus precluding summary judgment.²⁷⁰

The *Schrader* decision demonstrates the limits of the qualified immunity defense in the employment setting. Plaintiffs increasingly are bringing defamation-type actions (in addition to discrimination claims) against their former

264. *Id.*

265. *Id.*

266. *Id.*

267. *Id.*

268. *Id.*

269. *Id.*

270. *Id.*

employers. *Schrader* serves as a timely reminder for managers to exercise caution against unnecessary dissemination of potentially defamatory information.

XV. CONCLUSION

The labor and employment law changes that occurred during the survey period were as numerous as they were significant. The survey period witnessed the Supreme Court's clarification of the standard of proof in sexual harassment cases, the passage of the federal family and medical leave law, and growing judicial application of the exclusivity provisions of Indiana's worker's compensation statute. At the same time, however, other important issues remain unresolved, most notably the role of after-acquired evidence and the possibility of individual supervisor liability in discrimination litigation. As the field of labor and employment law continues to develop, these issues will be addressed and, in all likelihood, resolved. Contemporaneously, new issues will develop requiring additional judicial and legislative attention.

SURVEY OF 1993 DEVELOPMENTS IN THE INDIANA LAW OF PROFESSIONAL RESPONSIBILITY

CHARLES M. KIDD*

DONNA MCCOY SPEAR**

INTRODUCTION

The Indiana Supreme Court dealt with numerous aspects of the law of professional responsibility in a variety of ways during the past year. At least six areas merit comment: (1) evidence of mitigation in disciplinary cases; (2) summary suspensions from the practice of law; (3) imputing law firm status on lawyers practicing in “space sharing” arrangements; (4) suspension from practice as a form of discovery sanction; (5) *ex parte* communications with a “tribunal”; and (6) attempting to limit a lawyer’s liability to a client he or she has wronged.

The Court was repeatedly called upon to weigh the needs of the profession against the need to protect the public. In each case, the paramount concern was for the clients or potential clients of the lawyer. To promote that end, new rules exist to guide the Bar at large with regard to the conduct expected from lawyers.

I. MITIGATION REPRISE

As illustrated in the 1992 survey article on professional responsibility,¹ the existence of facts in mitigation can be an important tool for the lawyer facing disciplinary action. Given the diverse nature of these facts, no work could catalog a comprehensive list. By way of example, the more obvious factors include a lack of prior disciplinary action or inexperience in the practice of law.² It should be

* Staff Attorney, Indiana Supreme Court Disciplinary Commission. J.D., 1988, Indiana University School of Law—Indianapolis.

** Staff Attorney, Indiana Supreme Court Disciplinary Commission. J.D., 1991, Valparaiso University School of Law.

1. Charles M. Kidd, *Survey of 1992 Developments in the Indiana Law of Professional Responsibility*, 26 IND. L. REV. 1097 (1993).

2. For a short list of common factors which may be considered in mitigation, see AMERICAN BAR ASSOCIATION CENTER FOR PROFESSIONAL RESPONSIBILITY STANDARDS FOR IMPOSING LAWYER SANCTIONS 9.32 (1991). This list states:

- (a) absence of a prior disciplinary record;
- (b) absence of a dishonest or selfish motive;
- (c) personal or emotional problems;
- (d) timely good faith effort to make restitution or to rectify the consequences of misconduct;
- (e) full and free disclosure to disciplinary board or cooperative attitude toward proceedings;
- (f) inexperience in the practice of law;
- (g) character or reputation;

equally obvious that compelling and unusual facts in mitigation could also have a bearing on the prosecution of the lawyer's disciplinary action. Two such cases were decided by the Court during 1993. *In re Kristoff*³ and *In re Transki*⁴ both revolved around the lawyers' commission of crimes and involve facts in mitigation which the Court determined to be of some significance.

In *Kristoff*, the lawyer was retained by a homeowners' association to file liens against properties where the owners had failed to pay dues to the association. During 1988 and 1989, he accepted payments on the liens and did not turn them over to the client association. During the same period of time, the association received a "Certificate of Administrative Dissolution" from the Office of the Secretary of State because of the lawyer's failure to file an annual report. The association thereafter terminated its professional relationship with the lawyer. He did not, however, return the files on the outstanding liens. Instead, he continued to receive judgments that he did not forward to the client. The lawyer was ultimately charged with, and pleaded guilty to, one count of Theft, a Class D Felony. The trial court sentenced him to two years' imprisonment (which was suspended) and two years' probation.⁵ The respondent lawyer successfully completed all the terms of the criminal sentence.⁶

During the pendency of the disciplinary case, the lawyer made full restitution to the client. This is an important, but not all-powerful, mitigating fact.⁷ In *Kristoff*, restitution played a role in determining the severity of the sanction, but not in determining culpability for the underlying misconduct.⁸

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- (h) physical or mental disability or impairment;
 - (i) delay in disciplinary proceedings;
 - (j) interim rehabilitation;
 - (k) imposition of other penalties or sanctions;
 - (l) remorse;
 - (m) remoteness of prior offenses.

3. 611 N.E.2d 116 (Ind. 1993).

4. 620 N.E.2d 16 (Ind. 1993).

5. *Kristoff*, 611 N.E.2d at 117.

6. *Id.* at 117-18.

7. Restitution of converted client funds has traditionally been a difficult question in disciplinary cases. There are, in essence, two competing theories on this subject. On one side, courts believe that restitution diverts the focus of the disciplinary proceeding from its true point of regulating the bar and protecting the public. Under this view, restitution is not addressed to allow the lawyer and client to deal with any disputed funds in the regular course of litigation or mediation. The alternative view on restitution holds that the disciplinary process is a good place to deal with the question. The disciplinary process provides the greatest leverage available by which the lawyer can be forced to disgorge unearned client funds. For discussion of this subject of considerable length, see Patricia Jean Lamkin, Annotation, *Power of Court to Order Restitution to Wronged Client in Disciplinary Proceeding Against Attorney*, 75 A.L.R.3d 307, 310-14 (1977).

8. 611 N.E.2d at 118. Restitution must be voluntary to be used as an effective fact in mitigation. Forced or compelled restitution is neither an aggravating nor a mitigating fact. See AMERICAN BAR ASSOCIATION CENTER FOR PROFESSIONAL RESPONSIBILITY, STANDARDS FOR IMPOSING LAWYER SANCTIONS 9.4(a) (1991). The logic behind this position is that the lawyer

The lawyer's abuse of alcohol, however, presented the court with an opportunity to announce its view on the proper role of this type of conduct in disciplinary cases. It is not surprising that the lawyer's chemical dependency created a variety of devastating personal and professional problems, including the acts calling him to the court's attention in the first place. For this discussion on mitigation, however, the most salient feature of the case was the court's exploration of the effect of his attempted recovery:

In January 1990, he voluntarily entered an alcohol treatment program at Methodist Hospital in Merrillville, Indiana. He has maintained sobriety since his release from the hospital and has fully complied with the hospital's outpatient program. The hearing officer was convinced that Respondent was aware of the need to continue outpatient therapy indefinitely. The Respondent has become active in the Fifth Street Club for substance abusers. He is on the club's board of directors and serves as its vice president. Also, he has joined the Porter County Coalition for a Drug Free Indiana and is active in the organization. The Respondent has made complete restitution. We are further mindful of the hearing officer's observation that Respondent's dissipation may have been averted if a lawyers assistance program had been available at the time.⁹

The court then suspended the lawyer for one year and required, as a condition precedent to reinstatement, that he demonstrate his continuing alcohol-free status.¹⁰

This view comports with the general consensus among states that chemical dependency, per se, is not a mitigating factor. The mitigating effect of chemical dependency comes from the lawyer's success at recovery.¹¹ It occurs over a number of levels with basic recovery being the lowest tier. The effect is even stronger when the lawyer has attempted to correct the damage done to the client. The mitigating effect of recovery is strongest when the lawyer assumes, as in *Kristoff*, a leadership role in making treatment available to others who are impaired.¹² Finally, the period of sobriety for the lawyer can also affect the determination of the appropriate sanction.¹³

may have valid claims or defenses regarding all or part of the money. If so, the lawyer should be allowed to assert those positions in a court. See *In re Ackerman*, 330 N.E.2d 322, 324 (Ind. 1975).

9. 611 N.E.2d at 117-18.

10. *Id.*

11. E.g. *People v. Luxford*, 626 P.2d 675, 677 (Colo. 1981); *In re Strickland*, 436 A.2d 1337, 1339 (N.J. 1981); *In re Leardo*, 805 P.2d 948, 955 (Cal. 1991).

12. See 611 N.E.2d at 117-18. See also *Florida Bar v. Farbstein*, 570 So.2d 933, 935 (Fla. 1990).

13. See *In re Driscoll*, 423 N.E.2d 873, 874 (Ill. 1981).

In another unusual scenario, the Indiana Supreme Court found that the sanction for a lawyer's misconduct should be mitigated because of the physical disability of a family member. In *In re Transki*,¹⁴ the lawyer pleaded guilty to one felony charge of filing a false income tax return in violation of federal law.¹⁵ His sentence in the U.S. District Court of two years' imprisonment was suspended.¹⁶ The court then placed him on probation.¹⁷ Although he was specifically charged with underpaying his tax liability by about \$31,000, he repaid the government \$260,000 in taxes, interest and penalties.¹⁸

By way of mitigation, the Supreme Court found that no client funds had been misused and that personal monetary gain was not a factor in the underlying misconduct. The respondent lawyer's criminal charges grew out of an attempt to establish an informal trust for his daughter who was entering the final stages of a terminal case of juvenile diabetes.¹⁹ The Internal Revenue Service subsequently recharacterized the trust as belonging to the lawyer. Those monies accounted for his under-reporting of his tax liability. The court found it significant that:

He spent much of his time and energy, and substantial sums, in an effort to save his daughter's life. No client or professional trust was ever betrayed through Respondent's criminal misconduct. Respondent has shown genuine remorse for his offense and made no effort to transfer blame. He fully complied with the terms of his probation. . . . Thus, we are convinced that the acts leading to Respondent's conviction are an unfortunate aberration in an otherwise exemplary legal career.²⁰

The Court then suspended the lawyer from practice for ninety days.²¹

Although the facts in *Transki* are relatively uncommon, they address a theme in many disciplinary cases: Influences outside of the lawyer's role as a professional sometimes bear on professional misconduct charges that follow. The background of *Transki* differs from other cases in that the common situation involves some personal emotional or physical problem which affects the lawyer personally.²² These cases generally take one of two forms. In the first, the

14. 620 N.E.2d 16 (Ind. 1993).

15. *Id.* at 16; see 26 U.S.C. § 7206(1).

16. 620 N.E.2d at 16.

17. *Id.*

18. *Id.*

19. *Id.* at 17.

20. *Id.* (footnote omitted).

21. *Id.*

22. See *In re Clanin*, 619 N.E.2d 269 (Ind. 1993). In that case, the lawyer's health problems were the reason behind his unauthorized removal of funds from an estate. The problems did not prevent him from practicing law or affect his mental abilities in any significant fashion. Other mitigating factors included a long and productive career as an attorney in his

lawyer's problems are severe, but do not affect the lawyer's ability to practice.²³ In the second, the problems are of such a profound nature that the lawyer cannot continue to practice.²⁴ *Transki* presents a very rare circumstance where a problem directly involving a third person, rather than the attorney, can serve as the basis for mitigating the sanction in a disciplinary case.

II. SUMMARY SUSPENSION FROM PRACTICE

By amendment to the Indiana Rules for Admission to the Bar and Discipline of Attorneys, effective May 25, 1993, a new mechanism was created whereby a lawyer can be suspended almost immediately after receiving a felony conviction. This change was amended into the rule governing procedure in disciplinary cases.²⁵ In essence, the new rule requires the Executive Secretary of the Disciplinary Commission to provide the Supreme Court with certified copies of the conviction as soon as it is available.²⁶ Those copies are then

community. He received a one year suspension from practice.

23. See, e.g., *In re Cawley*, 602 N.E.2d 1022 (Ind. 1992). In that case, the attorney was "experiencing financial difficulties in the office compounded by domestic problems." *Id.* at 1023. The attorney was retained for an estate matter by co-personal representatives whom he had known since childhood. He withdrew \$12,000 from the estate, and attempted but failed to notify one of the co-representatives about the withdrawal. When confronted, the attorney repaid with interest and recognized the severity of his misconduct. The attorney received a six-month suspension.

24. See, e.g., *In re Stove-Pock*, 604 N.E.2d 606 (Ind. 1992). In that case, the lawyer's serious medical condition led to her addiction to prescription pain killers. She was subsequently convicted of forgery, and of obtaining a controlled substance by fraud or deceit. Although the lawyer entered a treatment program after her arrest and remained drug-free, the court found that her condition was so debilitating that it prevented her from practicing law. She received a three-year suspension from practice due to the particularly egregious circumstances in the underlying criminal case. See also *In re Barron*, 271 S.E.2d 474 (Ga. 1980).

25. INDIANA RULES FOR ADMISSION TO THE BAR AND THE DISCIPLINE OF ATTORNEYS, Rule 23, §§ 10 & 11 (1993 Amendments).

26. The full text of the relevant portions of the amendment provides:

[§10](e) Upon receipt of information indicating that an attorney has been convicted of a crime punishable as a felony under the laws of any state or of the United States, the Executive Secretary shall verify the information, and, in addition to any other proceeding initiated pursuant to this Rule, shall file with the Supreme Court a Notice of Conviction and Request for Suspension, and shall forward notice to the attorney by certified mail.

[§11](a) Upon finding that an attorney has been convicted of a crime punishable as a felony, the Supreme Court may suspend such attorney from the practice of law pending further order of the Court or final determination of any resulting disciplinary proceeding.

(b) When it receives a Request for Suspension, the Court may issue an order suspending the attorney, and such suspension shall be effective thirty (30) days after the issuance of the order. Within twenty (20) days after the issuance of said order, the attorney may assert in writing any deficiency that establishes that the suspension may not properly be ordered.

forwarded to the court with a formal request for suspension and the court acts on the request in due course.

Suspension from practice is effective thirty days after an order regarding the convicted lawyer is issued. If the lawyer does not believe the suspension is proper, he or she is entitled to offer a written submission to the court within twenty days of the issuance of the order.²⁷ This mechanism allows the court to consider factors beyond those covered in the conviction before actually depriving the lawyer of his or her license. A summary suspension remains in effect until further order of the court.²⁸ The new suspension mechanism provides for almost immediate protection for the public where a lawyer is convicted of a crime.²⁹ This prophylactic effect prevents lawyers convicted of felonies from undertaking new matters or continuing to represent clients while facing possible imprisonment.

The new mechanism supplements one already provided in the rule.³⁰ Under that method, the Commission usually files a Motion for Suspension Pending Prosecution simultaneously with the filing of the Verified Complaint for Disciplinary Action. The primary distinction between the two methods is that the Motion to Suspend Pending Prosecution is analogous to a request for a temporary injunction. There are essentially three steps to suspending a lawyer under this motion. First, there is an evidentiary hearing before a hearing officer, which can take a considerable amount of time. Second, the hearing officer then reduces his or her findings and recommendations to a writing that is submitted to the court. Finally, the court decides whether the findings support a suspension *pendente lite* and when it should become effective.³¹ Pursuing a suspension using this method can be time consuming, but it does provide for the maximum due process for the respondent lawyer. Use of this mechanism also requires one or both sides to present all or part of its case-in-chief before the final hearing on the merits of the disciplinary action.

(c) The judge of any court in this state in which a lawyer is convicted of a crime shall, within ten (10) days after the conviction, transmit a certified copy of the judgment of conviction to the Executive Secretary of the Indiana Supreme Court Disciplinary Commission.

27. *Id.* § 11(b).

28. *Id.* § 11(a).

29. *See, e.g., In re Dunnuck*, 615 N.E.2d 431 (Ind. 1993).

30. INDIANA RULES FOR ADMISSION TO THE BAR AND THE DISCIPLINE OF ATTORNEYS, Rule 23, § 11(f) (1993) provides:

(f) If [after the Commission authorizes the filing of a disciplinary Complaint against the lawyer], the Commission determines that there is reasonable cause to believe respondent is guilty of misconduct which, if proven, would warrant suspension pending prosecution, it shall include a motion to that effect in the aforesaid report to this Court, and this Court shall so advise the hearing officer or officers.

31. INDIANA RULES FOR ADMISSION TO THE BAR AND THE DISCIPLINE OF ATTORNEYS, Rule 23, § 14(g) (1993).

The court's use of the language "... a crime punishable as a felony" in section 10(e)³² suggests that a convicted lawyer would also face summary suspension where the nature of the conviction is such that the lawyer would be eligible for Alternative Misdemeanor Sentencing under the Indiana Criminal Code.³³ Under that law, a person convicted of a felony can, in some circumstances, receive a misdemeanor sentence. The result, with respect to the new summary suspension mechanism, is that in determining whether the lawyer should be suspended from practice pending a disciplinary case based upon the criminal conduct, the conviction of a felony, not the sentence imposed by the trial court, controls.

III. TRUEBLOOD: SUSPENSION AS DISCOVERY SANCTION

A. Background

In June 1993, the Indiana Supreme Court adopted a hearing officer's findings of fact and recommendation that attorney Karen S. Trueblood be suspended from practice until she complied with the hearing officer's orders compelling discovery.³⁴ The suspension of an attorney's license to practice law as a discovery sanction is unprecedented in the State of Indiana and may represent the first suspension of its kind to be issued by any state supreme court.

In *In re Trueblood*, the Disciplinary Commission filed a verified complaint against Trueblood, alleging several acts of misconduct. Prior to filing a verified complaint, the Commission subpoenaed information from the Respondent pursuant to the provisions of section nine of Indiana Rules for Admission to the Bar and the Discipline of Attorneys.³⁵ The Respondent failed to comply with the Commission subpoena and the Commission later sought the information through the use of conventional discovery methods available under section fourteen of Admission and Discipline Rule 23 and the Rules of Trial Procedure.³⁶

32. For the text of INDIANA RULES FOR ADMISSION TO THE BAR AND THE DISCIPLINE OF ATTORNEYS, Rule 23, § 10(e) (1993), see *supra* note 26.

33. See IND. CODE § 35-50-2-7(b) (1990).

34. *In re Trueblood*, 616 N.E.2d 8 (Ind. 1993).

35. The text of § 9 provides in pertinent part: "In addition to the powers and duties set forth in this Rule, the Executive Secretary shall have the power and duty to: . . . (f) issue subpoenas in the name of the Commission, including subpoenas duces tecum. The failure to obey such a subpoena shall be punished as a contempt of this Court." INDIANA RULES FOR ADMISSION TO THE BAR AND THE DISCIPLINE OF ATTORNEYS, Rule 23, § 9(f) (1993).

36. Section 14(b) provides, in pertinent part:

Either the Executive Secretary or the respondent may file with the hearing officer a motion to take depositions or a motion to produce certain documents or records, setting forth the reasons why such depositions should be taken or such records should be produced. The hearing officer may permit the taking of such depositions or may require the production of documents or records under such terms and conditions as he

Upon Trueblood's failure to comply, the hearing officer issued a Recommended Order of Sanction, recommending that the appropriate sanction for the Respondent's contempt be an order from the Indiana Supreme Court that Trueblood be suspended from the practice of law until she complied with the Commission's outstanding discovery requests. Accordingly, on June 18, 1993, the Indiana Supreme Court suspended Trueblood from practice pending compliance with the discovery order issued by the hearing officer.

B. Authority

Admission and Discipline Rule 23, section 11(f) allows a prehearing suspension where the Commission determines that there is reasonable cause to believe that the Respondent committed the misconduct alleged and such misconduct would warrant suspension.³⁷ However, this provision was not applicable in *Trueblood*: the suspension was based solely on her failure to comply with discovery orders issued by the hearing officer, and had no basis in the underlying misconduct with which Trueblood was charged. Thus, the provisions of Rule 23, section 11(f) could not be used by the hearing officer as a basis for the recommendation to suspend Trueblood for her failure to provide discovery. Prior to filing its verified complaint, the Disciplinary Commission proceeded under the authority granted to it in Admission and Discipline Rule 23, section 9(f). This rule provides that the Executive Secretary of the Disciplinary Commission has the power to issue subpoenas duces tecum, and that failure to comply is punishable as contempt of the Supreme Court.³⁸

However, rather than seeking sanctions under this rule, the Commission chose to seek discovery via the authority granted to the hearing officer in sections 13(d) and 14(b) of Admission and Discipline Rule 23 after a verified complaint had been filed.³⁹ Section 13(d) provides that hearing officers are authorized to take the necessary steps to fulfill their responsibilities. Section 14(b) provides that hearing officers may exercise their discretion in requiring the production of documents, but that the terms and conditions they impose shall follow the Indiana Rules of Civil Procedure pertaining to discovery proceedings as closely as possible. Trial Rule 37(B)(2) provides that a trial court may take

may deem proper. Such terms and conditions shall, as nearly as practicable, follow the Indiana Rules of Civil Procedure pertaining to discovery proceedings.

INDIANA RULES FOR ADMISSION TO THE BAR AND THE DISCIPLINE OF ATTORNEYS, Rule 23, § 14(b) (1993). See IND. R. TRIAL P. 26-37 (Burns 1993).

37. For the text of § 11(f), see *supra* note 30.

38. See *supra* note 35.

39. The text of § 13 provides, in pertinent part: "In addition to the powers and duties set forth in the rule, hearing officers shall have the power and duty to: . . . (d) do all things necessary and proper to carry out their responsibilities under this rule." INDIANA RULES FOR ADMISSION TO THE BAR AND THE DISCIPLINE OF ATTORNEYS, Rule 23, § 13(d) (1993). For the text of § 14(b), see *supra* note 36.

any action that is just to address a party's failure to comply with a discovery order, including imposing expenses and attorney's fees. This rule governs sanctions when an attorney fails to provide discovery under the Indiana Rules of Civil Procedure.⁴⁰

Admission and Discipline Rule 23, Section 14(b)⁴¹ directs the hearing officer to follow as closely as possible Trial Rule 37(B)(2) ("the Trial Rule"), but does not limit the hearing officer to its provisions. Although it serves as a useful guideline for discerning which discovery sanctions are available to the hearing officer, the Trial Rule's provisions were not altogether applicable in *Trueblood*. In this instance, the Disciplinary Commission was seeking information that could only be supplied by Trueblood herself. Thus, any remedy for her failure to comply must address and seek to rectify her failure to provide that information. The provisions of the Trial Rule cannot accomplish that task. Although they are the most commonly used sanctions, since they generally rectify failure to provide discovery during the pendency of a case, a judge is not limited to them. Professor Harvey has commented that:

Rule 37 is designed to protect and enforce discovery as the principal means of ascertaining information about a trial or litigation. Its sanctions may be invoked when the conduct of a party or person is not

40. IND. R. TRIAL P. 37(B)(2) provides, in pertinent part:

If a party . . . fails to obey an order to provide or permit discovery, . . . the court in which the action is pending may make such orders in regard to the failure as are just, and among others the following:

- (a) An order that the matters regarding which the order was made or any other designated facts shall be taken to be established for the purposes of the action in accordance with the claim of the party obtaining the order;
- (b) An order refusing to allow the disobedient party to support or oppose designated claims or defenses, or prohibiting him from introducing designated matters in evidence;
- (c) An order striking out pleadings or parts thereof, or staying further proceedings until the order is obeyed, or dismissing the action or proceeding or any part thereof, or rendering a judgment by default against the disobedient party;
- (d) In lieu of any of the foregoing orders or in addition thereto, an order treating as a contempt of court the failure to obey any orders except an order to submit to a physical or mental examination under Rule 35;
- (e) Where a party has failed to comply with an order under Rule 35(A) requiring him to produce another for examination, such orders as are listed in paragraphs (a), (b), and (c) of this subdivision, unless the party failing to comply shows that he is unable to produce such person for examination.

In lieu of any of the foregoing orders or in addition thereto, the court shall require the party failing to obey the order or the attorney advising him or both to pay the reasonable expenses, including attorney's fees, caused by the failure, unless the court finds that the failure was substantially justified or that other circumstances make an award of expenses unjust.

41. For the text of the rule, see *supra* note 36.

frivolous, or unreasonable, or groundless, but is careless or negligent, or inattentive, or disrespectful, or disobedient, or many other possible conditions, as well as when conduct is frivolous or unreasonable or groundless.⁴²

The provisions of the Trial Rule were not adequate in *Trueblood* because of the Disciplinary Commission's unique position in requesting otherwise confidential information, and because of the possible harm Trueblood's conduct posed to members of the public. Remedies suggested in the Trial Rule include monetary sanctions, a bench warrant for the Respondent's arrest, or an order declaring either that certain facts be deemed admitted or prohibiting the Respondent from asserting certain claims or defenses. None of these provisions would have provided the information the Commission sought. In this case, the only way for the Respondent to purge the contempt was to provide the materials as ordered. Since the Trial Rule's usual remedies were not adequate, the hearing officer recommended suspension as the sanction best calculated to impress upon the Respondent the seriousness of the matter and the extent of her duty as an officer of the court to cooperate in disciplinary proceedings. Although Trueblood's suspension as a discovery sanction in the disciplinary matter is unusual, it is within the court's discretion under the Trial Rule.

C. *Applicability to Disciplinary Proceedings Generally*

In *Trueblood*, the hearing officer recommended that the Respondent be suspended from the practice of law for failing to comply with the order that she respond to the Disciplinary Commission's discovery requests. The fact that the Indiana Supreme Court followed the recommendation may lead to speculation about whether such a practice will become a matter of course in disciplinary matters where a Respondent fails to comply with the discovery requests of the Disciplinary Commission.

The Indiana Supreme Court has addressed the issue of the Disciplinary Commission's use of its authority to charge misconduct as a result of a Respondent's failure to provide requested information. In *In re Koryl*⁴³ and *In re Duffy*,⁴⁴ the Supreme Court determined that a Respondent is under no obligation to answer a complaint filed by the Commission. The Commission may seek, like any civil litigant, to gather information through the discovery process.⁴⁵

Trueblood extends *Koryl* and *Duffy* to situations where the Respondent fails to comply with the Commission's attempts to gather information through the discovery process. It is understood that the Commission cannot force a party to

42. WILLIAM F. HARVEY, INDIANA PRACTICE: RULES OF PROCEDURE ANNOTATED § 37.4, at 74-75 (1988).

43. 481 N.E.2d 393 (Ind. 1985).

44. 482 N.E.2d 1137 (Ind. 1985).

45. *In re Koryl*, 481 N.E.2d at 394; *In re Duffy*, 482 N.E.2d at 1138.

respond to a complaint. However, where traditional discovery procedures cannot rectify the Respondent's failure to comply, then under the provisions of *Trueblood*, the Disciplinary Commission may seek extraordinary sanctions through the hearing officer and the Supreme Court. *Trueblood* is unique not only because the sanctions were sought after the verified complaint was filed and the discovery process begun, but also because the Respondent was suspended for failure to comply with the hearing officer's order to comply, not the Commission's request for information.

Trueblood is not limited to its facts, but the circumstances of *Trueblood*'s suspension indicate the types of disciplinary cases in which such a suspension is appropriate. *Trueblood* will not apply to every disciplinary matter in which the Respondent refuses a Commission discovery request. Rather, the case sets precedent where the Commission seeks knowledge via formal discovery that only the Respondent can supply. The Disciplinary Commission is in a unique position in that it is permitted access to information that is not readily attainable by other investigative agencies. The Disciplinary Commission must be allowed access to such information in order to effectively investigate allegations of attorney misconduct. In many situations, the Commission investigates allegations of attorney misconduct by first seeking basic background information about a Respondent and their law practice. Often, the Respondent is the only source from which the Commission can obtain such information. *Trueblood* would have no effect on cases wherein the Commission seeks information attainable from the Respondent as well as other sources. In such cases, the Respondent may still be held in contempt for failure to comply with an order of the hearing officer, but suspension may not be the most appropriate remedy for that failure.

D. Applicability to Other Types of Legal Proceedings

Although *Trueblood* may be applicable to disciplinary proceedings, the question remains whether *Trueblood* is applicable to other types of legal proceedings. Under Article 7, section 4 of the Indiana Constitution, the Indiana Supreme Court is vested with the exclusive authority to admit and discipline attorneys of the Indiana Bar.⁴⁶ In 1979, the court decided whether a trial judge

46. IND. CONST. art. 7, § 4 provides:

The Supreme Court shall have no original jurisdiction except in admission to the practice of law; discipline or disbarment of those admitted; the unauthorized practice of law; discipline, removal, and retirement of justices and judges; supervision of the exercise of jurisdiction by the other courts of the State; and issuance of writs necessary or appropriate in aid of its jurisdiction. The Supreme Court shall exercise appellate jurisdiction under such terms and conditions as specified by rules except that appeals from a judgment imposing a sentence of death, life imprisonment or imprisonment for a term greater than fifty years shall be taken directly to the Supreme Court. The Supreme Court shall have, in all appeals of criminal cases, the power to review all questions of law and to review and revise the sentence imposed.

could implement the type of sanction recommended in *Trueblood*.⁴⁷ In *McQueen*, the Indiana Supreme Court determined that although trial courts hold broad power to punish attorney misconduct, trial judges have no power to suspend attorneys from the practice of law in their courts.⁴⁸

A. Vance McQueen, an attorney admitted in Indiana, was representing a criminal defendant in the Shelby Superior Court. McQueen filed a post-trial motion for change of judge for sentencing based upon comments made by the trial judge which McQueen considered prejudicial. After a hearing on the motion, the trial judge ruled that McQueen had intentionally misrepresented the court's remarks, and suspended McQueen from the practice of law in the Shelby Superior Court for ninety days.⁴⁹

McQueen appealed after the trial court denied a "Verified Motion to Vacate Finding and Judgment," challenging the jurisdiction of the trial court to suspend him. The Indiana Supreme Court heard the appeal because it has jurisdiction over all appeals involving the discipline of attorneys.⁵⁰ The Supreme Court held that, without question, "... a trial judge can protect his court against insult and gross violations of decorum by the infliction of summary punishment by fine, imprisonment or both via a contempt citation."⁵¹ The court also tracked the history of attorney disciplinary proceedings, noting that at one time the power to admit and suspend attorneys was placed in any court of record.⁵² In 1931, Indiana law was changed and the exclusive authority to admit attorneys to the practice of law was placed in the Indiana Supreme Court.⁵³ In 1967, the Rules of the Indiana Supreme Court were amended to provide that the exclusive jurisdiction of actions to disbar, suspend or discipline attorneys would lie with the Supreme Court.⁵⁴ At that point the power of circuit and superior courts to suspend attorneys was abolished and vested only in the Indiana Supreme Court.⁵⁵

The court concluded that the Shelby Superior Court's suspension of McQueen was an *ultra vires* act under the terms of Article 7, section 4 of the Indiana Constitution.⁵⁶ The court went on to note that the discretion to suspend attorneys invites abuse, and that such suspensions scattered throughout the legal

47. *In re McQueen*, 396 N.E.2d 903 (Ind. 1979).

48. *Id.* at 904-05.

49. *Id.* at 903.

50. *Id.* at 904 (citing IND. R. APP. P. 4(A)(2)).

51. *Id.* (citing IND. CODE § 34-4-7-1 and 6 (Burns 1973) and *Ex Parte Smith*, 28 Ind. 47 (Ind. 1867)).

52. *In re McQueen*, 396 N.E.2d 903, 904 (Ind. 1979) (citing 2 GAVIN & HORD'S INDIANA STATUTES § DCCLXXVII, p. 329 (1870)).

53. *Id.* (citing IND. CODE ANN. § 4-3605 (Burns. 1933)).

54. *Id.* at 905 (citing RULES OF THE INDIANA SUPREME COURT, Rule 3-21 (1967)).

55. *Id.*

56. *Id.* at 906.

system as punishment for attorneys' contempt of court would serve neither the system nor the clients deprived of counsel.⁵⁷

Even if the Indiana Supreme Court had not determined that circuit and superior courts do not have the power to suspend attorneys from the practice of law in their respective courts, the question is easily resolved. A hearing officer has authority that simply is not vested in a trial court judge. In the 1988 decision in *In re Cook*, the Indiana Supreme Court determined that in a disciplinary proceeding a hearing officer has discretion in discovery issues and the authority to do all things necessary and proper to carry out assigned responsibilities under the Disciplinary Rules, including enforcement of orders and directives.⁵⁸ In *Cook*, the Respondent contested the hearing officer's findings of misconduct, stating that he was denied due process because of actions taken by the hearing officer. The Supreme Court determined that the Respondent's right to due process was not violated by the hearing officer's actions in the disciplinary proceedings.⁵⁹ The court held that the hearing officer complied with the provisions outlined in Admission and Discipline Rule 23, and that the hearing officer's power includes the right to cite participants for contempt.⁶⁰

Although hearing officers derive the authority to carry out their duties directly from the Supreme Court, they still cannot suspend or disbar an attorney from the practice of law. In disciplinary proceedings, the court is the ultimate fact-finder.⁶¹ The court examines the findings presented by the hearing officer, which receive emphasis and attach credibility, but are not binding.⁶² As in *Trueblood*, the hearing officer, unlike a trial judge, can find an attorney in contempt, make findings on the circumstances leading up to the contempt citation, and recommend an appropriate sanction to the court. The ultimate decision, however, is the nondelegable duty of the Indiana Supreme Court.

In a disciplinary proceeding, a hearing officer is appointed by and derives authority from the Indiana Supreme Court.⁶³ The Indiana Supreme Court in turn receives its authority regarding disciplinary proceedings from the Indiana Constitution.⁶⁴ Although a trial court, also receives its authority from the Indiana Constitution, it is not delegated the power to prohibit an attorney from

57. *In re McQueen*, 396 N.E.2d 903, 904 (Ind. 1979).

58. *In re Cook*, 526 N.E.2d 703, 705 (Ind. 1988).

59. *Id.*

60. *Id.* at 705-06 (citing INDIANA RULES FOR ADMISSION TO THE BAR AND THE DISCIPLINE OF ATTORNEYS, Rule 23, §§ 13, 14(b) (1993)).

61. *Id.* at 706; *see also In re Allen*, 470 N.E.2d 1312, 1315 (Ind. 1984).

62. *In re Cook*, 526 N.E.2d 703, 706 (Ind. 1988).

63. *See* INDIANA RULES FOR ADMISSION TO THE BAR AND THE DISCIPLINE OF ATTORNEYS, Rule 23 (1993).

64. *See* IND. CONST. art. 7, § 4.

practicing before that court.⁶⁵ Therefore, the effects of *Trueblood* do not apply to legal proceedings in general, but only to disciplinary proceedings specifically.

IV. SEXSON: WHEN DOES SPACE SHARING BECOME A LAW FIRM?

A. Facts

During 1993, the Indiana Supreme Court addressed the issue of attorney space sharing, and whether, under certain circumstances, such an arrangement can constitute a "law firm" under the provisions of Rule 1.10(a) of the Rules of Professional Conduct. In *In re Sexson*,⁶⁶ Sexson maintained law offices with five other attorneys, one of whom was named Thompson. The attorneys used common letterhead, and shared office space, a secretary, and three telephone lines. The individual offices were left open and accessible to the other attorneys in the office, and client file cabinets were observable from a common hallway. In addition, conversations in the individual offices could be heard from this common hallway.

In 1987, Thompson was retained to represent a couple ("the Zimmermans") in a personal injury suit in which they were the plaintiffs. In early 1991, Mr. Zimmerman filed for dissolution of marriage and hired an attorney outside the offices of Sexson ("the Respondent") and Thompson. Mrs. Zimmerman employed the Respondent to represent her in the dissolution proceedings. In March 1991, the Respondent appeared for Mrs. Zimmerman and filed a cross-petition for dissolution of marriage. On July 15, 1991, Thompson settled the Zimmerman's personal injury case. On July 18, 1991, the Respondent filed for and received an order restraining Mr. Zimmerman from negotiating his settlement check. The next day, Mr. Zimmerman called to set up a time to pick up his settlement check. Upon arriving at the law office approximately one hour later, he was met by the Respondent and served with the restraining order.

The Respondent was charged with violating Rules 1.7(a) and 1.10(a) of the Rules of Professional Conduct.⁶⁷ The Supreme Court determined that the Respondent had engaged in misconduct, and the facts represented only a single

65. See IND. CONST. art. 7, § 8; IND. CONST. art. 7, § 1; see also *Kostas v. Johnson*, 69 N.E.2d 592 (Ind. 1946).

66. 613 N.E.2d 841 (Ind. 1993).

67. *Id.* at 842-43. Rule 1.7(a) provided: "A lawyer shall not represent a client if the representation of that client will be directly adverse to another client, unless: (1) the lawyer reasonably believes the representation will not adversely affect the relationship with the other client; and (2) each client consents after consultation." INDIANA RULES OF PROFESSIONAL CONDUCT, Rule 1.7(a) (1987)

Rule 1.10(a) provided: "While lawyers are associated in a firm, none of them shall represent a client if he knows or should know in the exercise of reasonable care and diligence that any one of them practicing alone would be prohibited from doing so by Rules 1.7, 1.8(c), 1.9 or 2.2." INDIANA RULES OF PROFESSIONAL CONDUCT, Rule 1.10(a) (1987).

instance of misconduct, and therefore a public reprimand was the appropriate sanction.⁶⁸

The Court found that the Respondent had represented only Mrs. Zimmerman. In order to find misconduct by the Respondent, the Court first had to decide whether Thompson was disqualified from representing Mrs. Zimmerman and whether the disqualification could be imputed to the Respondent.⁶⁹

The Court went on to determine that under Rule 1.7(a), Thompson could not have represented Mrs. Zimmerman if such representation would have been adverse to Mr. Zimmerman. In 1984, the Indiana Supreme Court held in *In re Colestock* that the representation of one spouse in a divorce and the joint representation of both marital parties in other legal proceedings can amount to representation of adverse interests.⁷⁰ The court further found that in *Sexson*, Thompson had already been representing the Zimmermans in the personal injury case when the dissolution proceedings were filed. Because Mrs. Zimmerman's interests were adverse to those of Mr. Zimmerman in the dissolution, Thompson could not represent Mrs. Zimmerman in the dissolution, and represent both Zimmermans in the other proceeding.⁷¹

The court then addressed the issue of whether Thompson's disqualification could be imputed to the Respondent, stating that the central issue was whether the space sharing arrangement between Sexson, Thompson and the other attorneys fell within the meaning of the term "firm" as defined under the provisions of Rule 1.10(a) of the Rules of Professional Conduct.⁷² The court looked to the commentary in Rule 1.10(a) in arriving at its decision:

[T]he definition of 'firm' is a question of fact. In such analysis, it is crucial to look at the level of association, the appearance of the association to the public, any specific agreements, access to confidential information, and the purpose of the rule. But in the end, as stated in this comment, if attorneys 'present themselves to the public in a way suggesting that they are a firm or conduct themselves as a firm, they should be regarded as a firm for purposes of the Rules'.⁷³

In light of that commentary, the court found that the arrangement fit within the definition of a firm, thus imputing Thompson's disqualification to the Respondent, and causing the Respondent to engage in conflicting representation.⁷⁴ The use of common letterhead and telephone lines, the apparent access

68. 613 N.E.2d at 843.

69. *Id.* at 842.

70. *Id.* at 842.

71. *Id.* at 843.

72. *In re Sexson*, 613 N.E.2d 841 (citing INDIANA RULES OF PROFESSIONAL CONDUCT, Rule 1.10(a) and cmt. (1987); *see supra* note 67).

73. 613 N.E.2d at 843 (quoting RULES OF PROFESSIONAL CONDUCT, Rule 1.10 cmt. (1992)).

74. 613 N.E.2d at 843.

to each other's confidential information, and the shared office personnel all combined to convey the impression to the general public that the attorneys were a firm.⁷⁵ The court relied on a reasonableness standard, where a space sharing arrangement is viewed from the client's perspective in ultimately determining whether a firm exists. The court held that it was reasonable for Mr. Zimmerman, when confronted by the Respondent with a restraining order prohibiting him from negotiating his settlement check, to conclude that Sexson, Thompson and the other attorneys were a "firm", and that the Respondent had engaged in adverse representation.⁷⁶

B. Analysis

Sexson provided the Indiana Supreme Court with its first opportunity to comment upon the common practice of space sharing by attorneys. As stated in a 1985 Legal Ethics Committee Opinion, the economics of private practice often require otherwise unassociated attorneys to share office space. However, the essential fact remains that a client's right to discreet and confidential dealings with their attorney must be protected.⁷⁷ *Sexson* warns attorneys representing opposing interests that imputed firm status can be imposed on attorneys who do not protect their clients' rights to confidential communications.

In enumerating factors which contribute to imputed firm status, the court specifically adopted those listed in the commentary to Rule 1.10(a): the appearance of association to the public; the existence of any specific agreements; attorneys' access to each other's confidential information; the policy behind the rule; and, most significantly, whether the manner in which attorneys present themselves to the public suggests that they are a firm.⁷⁸ Thus, according to *Sexson*, if an attorney enters into a space sharing arrangement, a good question to ask prior to undertaking potentially adverse representation is whether it would be reasonable for that client to assume, based upon the appearance and practices of the attorneys, that the attorneys are a firm rather than a group of attorneys sharing office space.⁷⁹ If there are no clear lines delineating that the attorneys each enjoy distinct law practices, firm status is likely to be imputed under *Sexson*.

Sexson puts attorneys engaged in space sharing arrangements on notice that the Supreme Court lends greater weight to the impression that such an arrangement conveys to clients than the attorneys' characterization of the relationship. While *Sexson* is one guideline for attorneys in space sharing situations who wish to avoid imputed firm status, the Legal Ethics Committee

75. *Id.*

76. *Id.*

77. Indiana State Bar Association Legal Ethics Comm., Formal Op. 8 (1985).

78. 613 N.E.2d at 843. See *supra* notes 72-73 and accompanying text.

79. *Id.*

has also opined on other measures that should be taken to avoid the appearance of firm status.

Opinion 3-1973 discusses whether criminal defendants can be represented by attorneys sharing space with prosecuting attorneys and deputy prosecuting attorneys.⁸⁰ In the situation before the Committee, a prosecutor or deputy prosecutor shared an office with other lawyers, used common stationery, had a common sign on the door, and, in one of the situations, used a common telephone listing. The question presented to the Committee was whether one of the attorneys sharing space with the prosecutor or deputy prosecutor could represent a defendant in a criminal case provided that the prosecutor or deputy prosecutor was not involved in the case.⁸¹

The Committee rendered an opinion, stating that the most important consideration is whether the relationship of the attorneys is presented to the public in such a way that the public is led to believe that the attorneys are a law firm.⁸² The Committee also pointed out that a lawyer has a duty not to misrepresent the lawyer's professional status by allowing clients to be misled into believing that the attorneys in that particular space sharing arrangement are associated in some way.⁸³ Use of common offices, letterhead, signs and telephone listings violates this duty.⁸⁴ The Committee recommended that, at a minimum, the following test should be applied when an attorney who shares space with a prosecutor or deputy prosecutor undertakes criminal representation:

- (1) There should be no sharing of liability, profits or responsibility;
- (2) Each attorney should use separate letterheads, cards and announcements containing his name only;
- (3) Each attorney should be listed separately in law lists and telephone directories;
- (4) Each attorney should have a separate office telephone number;
- (5) The building or office door should show no closer connection than 'Law Offices, Fred Doe, Arthur Smith.'⁸⁵

80. Indiana State Bar Association Legal Ethics Comm., Formal Op. 3 (1973).

81. *Id.*

82. *Id.*

83. *Id.*

84. *Id.*

85. Indiana State Bar Association Legal Ethics Comm., Formal Op. 3 (1973).

The Committee further stated that "[i]t must be accepted that the adherence to standards of professional responsibility will at times be inconvenient, and will at times, work to the financial disadvantage of lawyers."⁸⁶

The Committee extended their opinion in 3-1973 to all types of space sharing arrangements in Opinion 8-1985.⁸⁷ The question presented to the Committee in Opinion 8-1985 was whether attorneys who share office space may represent opposing litigants in the same case.⁸⁸ In Opinion 8-1985, although there was no formal association between them, three attorneys shared a building, a common lobby, a single telephone system, library and copying machine.⁸⁹ However, the attorneys maintained separate offices with entrances from the lobby or outside, separate secretaries, separate locked filing systems, and individual signs.⁹⁰

The Committee observed that Opinion 8-1985 involved the same principles applied in Opinion 3-1973, and applied the same minimum test to the situation in Opinion 8-1985, stating that the chief concern was still whether the appearance of partnership or association was great enough to invoke the restrictions on representing adverse interests upon space sharers.⁹¹ It determined that although the attorneys in Opinion 8-1985 met the minimum standards set in Opinion 3-1973, a concern regarding client confidentiality remained.⁹² The Committee stated that in a space sharing arrangement where the attorneys share a building with common areas,

[T]he client will be conscious of the fact that his every visit to his attorney's office may be known to the opposing attorney. The arrival of witnesses or potential witnesses at his attorney's office may be known to the opposing attorney.

Phone messages and correspondence may be perceived to be accessible to the opponent's attorney or staff. Research projects in the library may be in view of the opponent's attorney or his staff. Material inadvertently left in the copier is accessible.⁹³

Based on these concerns, the Committee determined that the attorneys practiced in a setting that gave the appearance to the public that client confidentiality was impaired, and that the mere appearance of such a breach was enough to diminish a client's confidence that his dealings with his attorney will remain carefully guarded.⁹⁴ The Committee suggested that the telephone system be changed so

86. *Id.*

87. Indiana State Bar Association Legal Ethics Comm., Op. 8 (1985).

88. *Id.*

89. *Id.*

90. *Id.*

91. Indiana State Bar Association, Legal Ethics Comm., Op. 8 (1985).

92. *Id.*

93. *Id.*

94. *Id.*

that each attorney had access to only that attorney's personal system. The Committee also noted that the presence of one secretary's desk in the lobby created a situation where the clients of one attorney may overhear confidences meant only for the secretary or the secretary's respective employer.⁹⁵ The Committee went on to suggest that this arrangement be changed. The Committee also noted that while the situation did not violate any disciplinary rules, care must be taken to avoid leaving materials in the copy machine or library, and that if the attorneys were to undertake opposing representation, the clients involved should be told about the space sharing situation in order to make an informed decision about whether or not to continue the representation.⁹⁶

The Ethics Committee Opinions along with the *Sexson* case outline prophylactic measures that attorneys in space sharing situations should implement to avoid being classified as a law firm. With the evolution of improved office procedures and electronic technology, attorneys must make every effort to recognize areas of concern and to correct them before allegations of misconduct arise. Three relatively recent technological advances—office computer systems, voice mail and fax machines—are possible problem areas. Computer filing systems accessible to all attorneys sharing space or those attorneys' staff members could certainly give the appearance that client confidentiality is not being properly preserved. The same is true when member attorneys share laptop computers, common computer programs or computer discs. Secondly, the widespread use of voice mail raises concern. The use of personal identification numbers within voice mail systems preserves a degree of confidentiality, but if other members of an office have access to an attorney's voice mail, then client confidentiality is at risk and imputed firm status is more likely. Shared fax machines are a third cause for concern. Considering the cost of an average fax machine and the fact that most attorneys enter into space sharing arrangements to economize on office and equipment costs, it may defeat the purpose of space sharing to require participating attorneys to maintain separate fax machines. However, fax machines in common areas invite breaches of client confidentiality. Extreme caution must be exercised to assure that only the intended recipient or an authorized staff member handle fax transmissions. Again, if a risk to client confidentiality is posed by the use of a common fax machine, and that risk cannot be eliminated via office procedures, then office economy may have to take a back seat to client consideration.

The practical aspects of maintaining a law office are rapidly changing. *Sexson* and the Ethics Committee Opinions articulate minimum standards for attorneys in space sharing arrangements for preserving client confidences and avoiding imputed firm status. However, each time a new piece of office equipment is purchased or a new office system or procedure is implemented,

95. *Id.*

96. Indiana State Bar Association Legal Ethics Comm., Op. 8 (1985).

space sharing attorneys should ask themselves how their clients would perceive such an arrangement. Above all, space sharing attorneys should take precautions to assure their clients that when information is disclosed it will remain confidential.

V. EX PARTE COMMUNICATION WITH A TRIBUNAL

Ex parte contact with a judge has long been prohibited in the law of professional responsibility.⁹⁷ At present, the practice is forbidden under Rule 3.5(b) of the Rules of Professional Conduct.⁹⁸ In general, the rule is intended to prevent the trial of a case outside of court and behind another party's back. In practice, however, the scope of the prohibition can be blurred by the proliferation of administrative tribunals and similar quasi-judicial bodies which affect the property rights of citizens.⁹⁹ The scope of the rule prohibiting ex parte contact was the subject of *In re LaCava*.¹⁰⁰

In *LaCava*, the respondent lawyer represented the defendant podiatrist in an action brought under Indiana's Medical Malpractice Act ("the Act").¹⁰¹ Under the Act, malpractice actions must first be presented to a Medical Review Panel before proceeding to a civil trial court.¹⁰² In this case, the plaintiffs nominated a podiatrist ("the Podiatrist") to the Medical Review Panel who was, at the time, a client of the defense attorney in an unrelated medical malpractice action. In addition, the lawyer and Podiatrist were friends. Neither the professional nor personal relationship between the two men was ever disclosed to plaintiff's counsel or the chairman of the Medical Review Panel.

After both parties made their submissions to the Panel, the matter was taken under advisement by the physicians. On the day the panel's decision was mailed to the parties, the respondent lawyer learned from the panel chairman that the panel unanimously found against his client. The lawyer next called the Podiatrist

97. It was prohibited under the former INDIANA CODE OF PROFESSIONAL RESPONSIBILITY to communicate, or cause another to communicate, with the judge in an adversarial proceeding without the consent or presence of the other party. INDIANA CODE OF PROFESSIONAL RESPONSIBILITY D.R. 7-110(b) (repealed 1986). There is a parallel proscription under the INDIANA CODE OF JUDICIAL CONDUCT Canon 3.B.8 (1993).

98. "A lawyer shall not: . . . (b) communicate ex parte with [a judge, juror, prospective juror or other official] except as permitted by law." RULES OF PROFESSIONAL CONDUCT RULE, Rule 3.5(b) (1992).

99. An unanswered issue involves the status of a mediator or someone serving in that role under the Alternative Dispute Resolution rules and whether contacts with them could be considered ex parte.

100. 615 N.E.2d 93 (Ind. 1993).

101. IND. CODE ANN. § 16-9.4 (West 1993) (current version at IND. CODE ANN. § 27-12).

102. See IND. CODE ANN. §§ 16-9.5-9-1 through 16-9.5-10-2 (West 1993) (current version at IND. CODE ANN. §§ 27-12-8-4, -12-10).

member of the panel and "berated and bombasted"¹⁰³ him regarding the Panel's decision.

The next day, the Podiatrist member called the Panel chairman and announced that he had changed his mind about the defendant's negligence. He did not, however, inform the Panel Chairman that he had spoken with the respondent lawyer. Subsequently, the other two members of the panel indicated that they had relied on the Podiatrist member of the panel in casting their votes and each, in turn, switched their opinions in favor of the defendant. Finally, the respondent lawyer withdrew from the case and the matter was submitted to a second Medical Review Panel.¹⁰⁴

The Supreme Court, in its analysis, focused on the scope of the prohibition against *ex parte* communication. In particular, the Court examined the relationship between Rule 3.9 of the Rules of Professional Conduct and the prohibition against *ex parte* communication found in Rule 3.5. Rule 3.9 provides:

A lawyer representing a client before a legislative or administrative tribunal in a nonadjudicative proceeding shall disclose that the appearance is in a representative capacity and shall conform to the provisions of Rules 3.3(a) through (c), 3.4(a) through (c) and 3.5.¹⁰⁵

In addition, the Court reviewed the comment to the Rule which, in pertinent part, provides:

In representation before bodies such as legislatures, municipal councils, and executive and administrative agencies acting in rule-making or policy-making capacity, lawyers present facts, formulate issues and advance argument in the matters under consideration. The decision-making body, like a court, should be able to rely on the integrity of the submissions made to it. A lawyer appearing before such a body should deal with the tribunal honestly and in conformity with applicable rules of procedure.¹⁰⁶

This analysis led the court to overturn the hearing officer's finding that no *ex parte* communication had occurred. The court stated unequivocally that the prohibition against *ex parte* contact should be given broad application:

The Hearing Officer, upon review of the commentary under Rule 3.9, concluded that in that the medical review panel was not a rulemaking or policy-making tribunal, the prohibition was not applicable. This Court does not so confine the operation of the rule.

103. 615 N.E.2d at 94.

104. *Id.* at 95.

105. INDIANA RULES OF PROFESSIONAL CONDUCT, Rule 3.9 (1987).

106. INDIANA RULES OF PROFESSIONAL CONDUCT, Rule 3.9 cmt. (1987).

A medical review panel is an integral part of the adversary process in the medical malpractice arena. The statutory procedure of the panel anticipates adversarial representation. (IC 16-9.5-9-5) Thereafter, the decision of the panel is admissible as expert opinion in subsequent judicial proceedings. (IC 16-9.5-9-9) This being the case, the entire dispositional process requires the appearance of fairness in the attainment of the panel's decision. Accordingly, just as the participants of a malpractice judicial proceeding must be free from ex parte communications, expert opinion derived in the adversary administrative pre-trial process must result from a process with the same limitations. We find that the members of the malpractice panel are "officials" within the confines of this rule. . . . We also find it troubling that Respondent shows absolutely no remorse for his conduct. The simple fact is that, before a final decision was rendered, Respondent communicated ex parte with an individual impartially considering the acts of Respondent's client. Respondent has defended his actions on a technical, narrow application of the statute. We cannot accept this approach. The issues of fundamental decisional fairness in this case are too obvious to permit credence in the overly technical arguments offered by Respondent.¹⁰⁷

LaCava presented a rare opportunity to examine the mandates of Rule 3.9. There was no truly parallel provision under the former Code of Professional Responsibility.¹⁰⁸ There was likewise no formal definition of a "tribunal" under prior law which encompassed the definition found in Rule 3.9 and the accompanying comment.¹⁰⁹ This Rule formally required an advocate to uphold the same ethical responsibilities in a wide variety of adversarial fora as the advocate would in any court. In fact, the rule currently adds one requirement: When representing a party in a "nonadjudicative" proceeding, the lawyer must make it known that the lawyer's presence is in a representative capacity.¹¹⁰ It further mandates that the same duties of candor¹¹¹ and fairness in dealing with

107. 615 N.E.2d 95-97.

108. The former INDIANA CODE OF PROFESSIONAL RESPONSIBILITY required that, "A lawyer shall not state or imply that he is able to influence improperly or upon irrelevant grounds any tribunal, legislative body, or public official." INDIANA CODE OF PROFESSIONAL RESPONSIBILITY, D.R. 9-101(c) (repealed 1986). Other provisions under Canon 7 of the Code hinted at different features which were later codified under Rule 3.9 of the Rules of Professional Conduct. Nowhere in the Code, however, was an advocate's role explicitly dealt with when appearing before a non-adjudicative body.

109. The definition in the INDIANA CODE OF PROFESSIONAL RESPONSIBILITY simply included "all courts and all other adjudicatory bodies." INDIANA CODE OF PROFESSIONAL RESPONSIBILITY, Definitions, 6 (repealed 1986).

110. See *supra* note 105 and accompanying text. See generally 1 GEOFFREY HAZARD, JR. & W. WILLIAM HODES, THE LAW OF LAWYERING § 3.9:101 (1990).

111. See INDIANA RULES OF PROFESSIONAL CONDUCT, Rule 3.3 (1987).

opposing parties¹¹² that are expected of the lawyer when appearing in any court be maintained while working in a professional capacity in arenas not traditionally thought of as tribunals.¹¹³

VI. LIMITATION OF PROFESSIONAL LIABILITY TO CLIENTS

The lawyer's ability to limit his or her malpractice liability to clients was one of the most notable changes between the former Code¹¹⁴ and the current Rules.¹¹⁵ Under the Code, the practice was forbidden.¹¹⁶ Under the Rules, a proposed limitation of liability is treated much the same as any other situation in which the lawyer's personal interests are potentially at odds with the client's. The lawyer must advise the client in writing that the client should be independently represented by another lawyer when considering whether to allow the limitation.¹¹⁷ In other words, the drafters of the Rules of Professional Conduct recognized that there might be situations in which the client could make an informed waiver of certain rights or remedies associated with a possible lawyer's future breach of the duty owed his clients.

This was the state of the law when the Court decided *In re Blackwelder*,¹¹⁸ in which the clients, named Gosnell, hired the lawyer to pursue an appeal of a default judgment rendered against them. At the time the lawyer was retained, the Gosnell's had filed a *pro se* Motion to Correct Errors and the trial court had denied it. Although the lawyer timely filed a praecipe for the record, and received it, he miscalculated the filing date and missed a jurisdictional deadline for filing the appeal. This occurred about three months after their first meeting.

The lawyer then arranged another meeting with the Gosnells and presented them with a document entitled, "Retainer Agreement an (sic) Release of Claims and Covenant Not To Sue."¹¹⁹ The lawyer proposed to reimburse the Gosnells for their out-of-pocket expenses associated with the appeal and file a bankruptcy petition on their behalf in exchange for the lawyer's release from liability. Under the agreement, the Gosnells would agree to forego filing both a

112. See INDIANA RULES OF PROFESSIONAL CONDUCT, Rule 3.4 (1987).

113. See *supra* note 105 and accompanying text.

114. INDIANA CODE OF PROFESSIONAL RESPONSIBILITY (repealed 1986).

115. INDIANA RULES OF PROFESSIONAL CONDUCT (effective 1987).

116. The INDIANA CODE OF PROFESSIONAL RESPONSIBILITY simply provided, "A lawyer shall not attempt to exonerate himself from or limit his liability to his client for his personal malpractice." INDIANA CODE OF PROFESSIONAL RESPONSIBILITY, D.R. 6-102(A) (repealed 1986).

117. INDIANA RULES OF PROFESSIONAL CONDUCT, Rule 1.8(h) (1987) provides:

A lawyer shall not make an agreement prospectively limiting the lawyer's liability to a client for malpractice unless permitted by law and the client is independently represented in making the agreement, or settle a claim for such liability with an unrepresented client or former client without first advising that person in writing that independent representation is appropriate in connection therewith.

118. 615 N.E.2d 106 (Ind. 1993).

119. *Id.* at 107.

malpractice suit and grievance with the Disciplinary Commission. The proposed agreement recited:

Attorney also recommended that the Clients take sufficient time to thoroughly consider the offer and to seek the advice of another attorney(s) before making a final decision; and Whereas, Clients have considered the offer and have consulted with another attorney. . . .¹²⁰

After executing the release, the lawyer reimbursed the Gosnells about \$2,000, filed a petition for bankruptcy on their behalf, and paid the filing fees associated with the bankruptcy. Thereafter, the Gosnells obtained a discharge of about \$300,000 in debts, including discharge of the default judgment which was the subject of the original appeal. The Gosnells then filed a grievance against the lawyer with the Disciplinary Commission and instituted a civil action for damages as well. At the trial of the disciplinary case, the evidence showed that, although the Gosnells spoke with another attorney before signing the Release, the subject of the Release was never discussed.

In finding that the lawyer committed misconduct, the Court recognized that any attempt by a lawyer to limit the lawyer's liability had been forbidden under prior law.¹²¹ The court explained its reasoning for imposing a public reprimand on the lawyer in some depth:

Such practices are still subject to close scrutiny but may not be subject to discipline under certain specific circumstances, where the client has been adequately advised in writing well in advance of final execution of any release or settlement. Providing to the client a copy of the proposed document so that it can be reviewed by independent counsel would further assure compliance with the intent of this rule.

Respondent failed to comply with the express requirement of this rule. The only written reference to the necessary advice was contained in the release prepared by Respondent and presented to the Gosnells at the time of execution. Such after-the-fact advice clearly fails to meet the letter and spirit of the rule.

In light of the findings and foregoing considerations, we conclude that, by limiting his liability for malpractice without adequate prior advice to seek independent counsel, the respondent violated Rule 1.8(h). We also conclude that respondent's conduct in preparing the release for his client's signature violates Rule 1.7(b).¹²² By procuring a promise not

120. *Id.*

121. *Id.* at 108.

122. INDIANA RULES OF PROFESSIONAL CONDUCT, Rule 1.7(b) (1987) provides, in pertinent part, "A lawyer shall not represent a client if the representation of that client may be

to file a disciplinary grievance, the respondent attempted to obstruct the disciplinary process and engaged in conduct prejudicial to the administration of justice, in violation of Prof. Cond. R. 8.4(d).¹²³

There are several problems with the agreement in *Blackwelder*. Chief among them is the fact that the proposed agreement was not "prospective" as required under the terms of the Rule. In this instance, the lawyer sought relief after committing the act which gave rise to liability. Viewed another way, it was an attempt to summarily settle a cause of action for malpractice without the benefit of independent legal advice for the client.

The comment to Rule 1.8 offers no guidance as to how subsection (h) was viewed by the drafters. At least one commentary¹²⁴ suggests that these types of prospective limitation agreements might be appropriate where the case presented to the lawyer is so fraught with danger for the lawyer that a prospective limitation might be the only feasible way for the client to obtain representation at all.¹²⁵ Such a circumstance was not present in *Blackwelder*. There is no suggestion in the opinion that the underlying appeal sought by the Gosnells was, in any way, tenuous or incapable of prosecution by the lawyer before the deadline for filing the record of proceedings expired.

Also important is the distinction drawn by the court between the violation associated with the release and the violation for the conflict of interest presented by the lawyer's preparation of the document itself.¹²⁶ Either violation, standing alone, would have been sufficient to sustain sanction based upon the lawyer's conduct. Although nothing in the Court's opinion suggests this analysis, a violation of Rule 1.7(b) could exist every time there is a violation involving prospective limitation of liability because the lawyer will always consider personal interests whenever such a limitation is created. In practice then, *Blackwelder* suggests that both rules, and any available commentary on each, should be consulted before attempting to create an agreement with a client limiting the lawyer's personal liability for malpractice.

Finally, *Blackwelder* reinforces the traditional view that it is misconduct for a lawyer to attempt to prevent a client from filing a grievance with the Disciplinary

materially limited by . . . the lawyer's own interests, unless: (1) the lawyer reasonably believes the representation will not be adversely affected; and (2) the client consents after consultation. . . ."

123. 615 N.E.2d at 108. See INDIANA RULES OF PROFESSIONAL CONDUCT, Rule 8.4(d) (1987) ("It is professional misconduct for a lawyer to: . . . (d) engage in conduct that is prejudicial to the administration of justice.").

124. 1 GEOFFREY HAZARD & W. WILLIAM HODES, THE LAW OF LAWYERING § 1.8:901 (1992 Supp.).

125. The authors of THE LAW OF LAWYERING also make the observation when a lawyer undertakes such precarious litigation "virtually any action the lawyer [takes] would be reasonable under the circumstances, and, paradoxically, no malpractice action would lie." *Id.*

126. See INDIANA RULES OF PROFESSIONAL CONDUCT, Rule 1.7(b) (1987). For text of the rule, see *supra* note 122.

Commission. There is no provision in either the Rules or the Code identifying any situation in which this practice might be appropriate. *Blackwelder* specifically identifies this conduct as prejudicial to the administration of justice.¹²⁷

VII. CONCLUSION

As this Article attempts to demonstrate, the Indiana Supreme Court's opinions regarding matters of professional responsibility have focused, in large part, on the protection of the public from wrongdoing by members of the Bar. As the rule changes and cases suggest, this concern for public protection includes suspensions prior to any final adjudication of misconduct. This sort of prophylactic measure suggests a steadfast commitment by the Court to hold lawyers to a high ethical standard. At the same time, facts in mitigation are given fair consideration provided they are not used at the expense of client welfare.¹²⁸

127. 615 N.E.2d at 108. See INDIANA RULES OF PROFESSIONAL CONDUCT, Rule 8.4(d) (1987).

128. The authors wish to note that the views expressed herein are not to be interpreted as those of the Indiana Supreme Court or the members of its Disciplinary Commission. The analyses presented are solely the product of the authors.

RECENT DEVELOPMENTS IN THE INDIANA LAW OF PRODUCT LIABILITY

R. ROBERT STOMMEL*

INTRODUCTION

During this survey period, both the federal and state appellate courts addressed a number of issues specifically relating to actions under Indiana's Product Liability Act. The most significant decisions were those of the Indiana Supreme Court defining the scope of recovery for property damage and economic loss in a strict liability case. In addition, the Indiana Court of Appeals addressed the issues of successor liability, assumption of duty, and product misuse. Both the Indiana Court of Appeals and the United States Court of Appeals for the Seventh Circuit resolved statute of limitations issues. Finally, the United States District Court for the Southern District of Indiana addressed the problem of proof of defect where the product is missing.

I. RECOVERY FOR PROPERTY DAMAGE AND ECONOMIC LOSS

In two cases decided on the same day, the Indiana Supreme Court defined the scope of recovery for property damage and economic loss under strict liability in a product liability action. In *Reed v. Central Soya Co.*,¹ the plaintiffs were dairy farmers whose cattle were damaged by pesticide-contaminated feed manufactured by Central Soya. After eating the feed for several weeks, the cows gradually became sick, resulting in low milk production and long term effects such as difficulty breeding. The Reeds sued Central Soya and the supplier of the contaminated feed ingredients for negligence, breach of implied warranty, and strict liability in tort. The appellate court affirmed summary judgment in favor of Central Soya on the strict liability claim, holding that the Reeds could not recover compensatory damages under strict liability because the damage to the cattle was not "sudden, major damage to property" as defined in Indiana's Product Liability Act.² In an opinion written by Justice Krahulik, the Indiana Supreme Court affirmed the denial of recovery for these strict liability damages.

* Member, Lewis & Wagner, Indianapolis. B.B.A., 1979, University of Wisconsin—Madison; J.D., *cum laude*, 1982, Indiana University School of Law—Indianapolis.

1. 621 N.E.2d 1069 (Ind. 1993).

2. *Id.* at 1070-71. Indiana Code § 33-1-1.5-2 states, in part: "'Physical harm' means bodily injury, death, loss of services, and rights arising from any such injuries, as well as sudden, major damage to property. The term does not include gradually evolving damage to property or economic losses from such damage." IND. CODE ANN. § 33-1-1.5-2 (West Supp. 1993).

Relying on *Sanco, Inc. v. Ford Motor Co.*³ and *General Electric Co. v. Drake*,⁴ the defendants argued that strict liability applies only when the defect in the product involves an occurrence of such an immediate and calamitous nature that human life and limb are exposed to a clear and significant danger.⁵ Rejecting this argument, the court first noted that tort law traditionally allows recovery for property damage in the absence of personal injury and secondly that the Product Liability Act itself expressly allows recovery for physical harm to property even in the absence of personal injury.⁶

The court distinguished *Sanco* as involving a claim for economic loss, rather than property damage.⁷ The court also found the defendants' reliance on *Drake* misplaced because the *Drake* court did not limit the application of strict liability in property damage cases only to circumstances in which the absence of personal injury is fortuitous; instead, the *Drake* court simply applied strict liability to those circumstances.⁸ Thus, risk of personal injury is relevant, but not necessary, to recover in strict liability for property damage caused by a defective and unreasonably dangerous product.

The *Reed* court nevertheless imposed a limitation on recovery in strict liability for losses that are solely economic in nature. The court found the Product Liability Act's provision on damages to be ambiguous because it allows recovery for "sudden, major damage to property," but excludes recovery for "gradually evolving damage to property or *economic losses from such damage*."⁹ Using statutory construction, the court determined that the term "economic losses from such damage" relates to "gradually evolving damage" rather than to the more remote "sudden, major damage."¹⁰ Accordingly, where damage evolves gradually, no recovery is allowed in strict liability for economic losses resulting from the gradual damage. On the other hand, if the property damage is "sudden and major," economic losses arising from that damage are recoverable under a strict liability theory.¹¹

The *Reed* court also reaffirmed the rule that strict liability does not apply where economic loss alone is alleged. When the loss is solely economic in

3. 771 F.2d 1081 (7th Cir. 1985).

4. 535 N.E.2d 156 (Ind. Ct. App. 1989).

5. 621 N.E.2d at 1073.

6. *Id.*

7. *Id.* In *Sanco*, the court held that a user or consumer of a product cannot recover in negligence or strict liability for purely economic losses. 771 F.2d at 1086.

8. 621 N.E.2d at 1073. In *Drake*, the court noted that the Product Liability Act "evinces a legislative intent to permit any 'user or consumer' to recover for physical harm to property without suggesting distinctions among the types . . . of physical harm." 535 N.E.2d at 159. The court then held that "when a product causes damage to property under circumstances in which the absence of personal injury is merely fortuitous, such as when an object explodes but does not inflict personal injuries on anyone, the imposition of tort liability on a manufacturer is justified." *Id.*

9. 621 N.E.2d at 1074. See IND. CODE ANN. § 33-1-1.5-2 (West Supp. 1993).

10. 621 N.E.2d at 1074.

11. *Id.*

nature, for example when the claim relates only to the product's failure to live up to expectations and not to property damage or personal injury, then no recovery is allowed in strict liability. In such instances, economic losses may only be recovered under contract theories.¹² To allow recovery in tort for purely economic losses would enable a buyer of goods to circumvent a seller's limitation or exclusion of warranties under the Uniform Commercial Code.¹³ Thus, "[c]ontract law remains the appropriate vehicle to redress a purchaser's disappointed expectations when a defect renders a product inferior or unable adequately to perform its intended function."¹⁴

In *Reed*, the plaintiffs suffered a decrease in the fair market value of their cows as a result of the contaminated feed. Because domestic cattle are regarded as property, and the measure of damages for loss is the market value of the animals immediately prior to the wrongful act, the court held that the *Reed* plaintiffs suffered "property damage," rather than mere economic loss. Therefore, they could recover their economic losses in conjunction with their property damage.¹⁵

Unfortunately, the plaintiffs could not satisfy the additional requirement that the property damage be "sudden and major" to allow for recovery. Lacking any statutory definition of those words, the court turned to dictionary definitions and noted that "sudden" contemplates both an element of time marked by abruptness or haste and an element of surprise in relation to the damage. The term "major" connotes some qualitative relationship in number or extent of damage. Thus, the court found that to recover for property damage in strict liability, the damage must happen quickly, unexpectedly, and be significant in scope.¹⁶ Applying these standards to the facts of *Reed*, the court held that the damage to the cattle was not sudden and major because it manifested itself incrementally over a period of time instead of as a calamitous event. Consequently, recovery was not permitted.¹⁷

In the companion case, the Indiana Supreme Court applied the new standards to a crop damage claim. In *Martin Rispens & Son v. Hall Farms, Inc.*,¹⁸ a significant portion of the plaintiff's watermelon crop was ruined by a disease traced to defective seeds purchased from the defendant. The bacteria affected the watermelon crop over a period of months—first appearing in the plaintiff's

12. *Id.* at 1074-75.

13. *See* IND. CODE ANN. § 26-1-2 (West 1988 & West Supp. 1993).

14. 621 N.E.2d at 1075.

15. *Id.*

16. *Id.* at 1075-76. The court also held that the question of whether damage is sudden and major is a question of law, taking into account the nature of the defect alleged, the type of risk presented, and the manner in which the injury arose. *Id.* at 1076.

17. *Id.*

18. 621 N.E.2d 1078 (Ind. 1993).

greenhouse and then later spreading to the melons themselves.¹⁹ The plaintiff testified that the disease was "an extremely slow growing thing."²⁰

The court held as a matter of law that this was gradually evolving damage to property and economic loss in the form of reduced crop yields. Thus, the damage was not sudden and major damage as contemplated by the Product Liability Act.²¹ In addition, the plaintiff's claim was based on damage to the product itself (melons grown from the purchased seeds), which made strict liability and negligence inapplicable. The proper remedy would have been a claim for breach of warranty.²² Reframing the rule set forth in *Reed*, the court stated: "Economic losses are not recoverable in a negligence action premised on the failure of a product to perform as expected unless such failure causes personal injury or physical harm to property other than the product itself."²³

II. SUCCESSOR LIABILITY AND ASSUMPTION OF DUTY

On review of summary judgment in *Lucas v. Dorsey Corp.*,²⁴ the Indiana Court of Appeals for the First District resolved the issue of whether a successor company owes a common law duty to a plaintiff or is a "seller" within the meaning of Indiana's Product Liability Act.²⁵ Delphi Corporation, an intermediate seller, ordered five derricks from Holan Division, a manufacturer of digger derricks. Delphi purchased the derricks to install on trucks it planned to sell to Indiana Bell. Holan Division later sold its assets in bankruptcy to Dorsey Corporation. The sale agreement stated that Dorsey would not assume Holan's liabilities. After the sale of Holan's assets, Delphi received an invoice for the derricks with directions to send payment to Dorsey. Delphi installed the derricks on trucks sold to Indiana Bell, and the plaintiff was subsequently injured by one of the derricks while working for Indiana Bell.²⁶

The court first determined whether sufficient evidence existed from which a jury could infer that Dorsey assumed a duty and, consequently, owed a duty of care under the general rule that a duty of care arises when a party voluntarily or gratuitously assumes such a duty.²⁷ Here, although the derricks were manufactured by Holan, Dorsey shipped them to Delphi with an invoice requiring payment to Dorsey. In addition, Dorsey put its name and address on each page of the operating and instruction manual and on the warranty that accompanied

19. *Id.* at 1080-81.

20. *Id.* at 1089.

21. *Id.*

22. *Id.* at 1089-91.

23. *Id.* at 1091.

24. 609 N.E.2d 1191 (Ind. Ct. App. 1993).

25. IND. CODE ANN. §§ 33-1-1.5-1 to -5.5 (West Supp. 1993).

26. 609 N.E.2d at 1194-95.

27. *Id.* at 1201 (citing *Phillips v. United Engineers & Constructors, Inc.*, 500 N.E.2d 1265, 1269 (Ind. Ct. App. 1986)).

the derrick. Dorsey's name also appeared within the text of the manual. In one section of the manual, the name of the predecessor company was stricken and Dorsey's name printed above it. Dorsey nevertheless argued that because neither designed nor manufactured the derrick, it owed no duty to the plaintiff.²⁸

From this evidence, the court concluded that a jury could infer that Dorsey assumed a duty to warn and instruct users on the safe use of the derrick.²⁹ Relying on *Dudley Sports Co. v. Schmitt*,³⁰ the court noted that where a vendor holds itself out as a manufacturer of a product and labels the product as such, it is held to the same standard of care in design, manufacture, and sale of a product as if it were in fact the manufacturer.³¹ A jury could thus find that by placing its name on the operating manual and warranty, Dorsey held itself out as the manufacturer of the derrick. Dorsey's agreement with its predecessor not to assume Holan's liabilities was not dispositive.³²

The court also found a genuine issue of material fact as to whether Dorsey was a "seller" of the product for purposes of strict liability. In support of its contention that it was not a seller of the derricks, Dorsey pointed out that four of the nine derricks purchased from Holan were returned and scrapped and that it discontinued the derrick product line upon purchasing the predecessor's assets. Distinguishing *Sukljian v. Charles Ross and Son Co.*,³³ the court noted that the corporation in *Sukljian* sold as surplus property only a single machine that it had previously used in its own production for eleven years.³⁴ In contrast, Dorsey's sale of the nine derricks presented a jury question as to whether it was a seller within the purview of Indiana's Product Liability Act.³⁵

III. MISUSE DEFENSE AND DUTY TO WARN

In *Underly v. Advance Machine Co.*,³⁶ the Indiana Court of Appeals for the Fourth District reviewed the adequacy of several jury instructions on the defense of misuse. Underly suffered a hydraulic fluid injection injury while investigating a leak in the hydraulic lines of a retriever. Underly first ran his hand along the hoses to detect any worn spots and found what he believed to be the source of a leak. He then held his finger over the hole while a co-worker pressurized the

28. 609 N.E.2d at 1201.

29. *Id.*

30. 279 N.E.2d 266 (Ind. Ct. App. 1972).

31. 609 N.E.2d at 1201.

32. *Id.* (citing *Cyr v. B. Offen & Co., Inc.*, 501 F.2d 1145, 1152-54 (1st Cir. 1974) and *Vernon Fire & Casualty Ins. Co. v. Graham*, 336 N.E.2d 829, 832 (Ind. Ct. App. 1975)).

33. 503 N.E.2d 1358 (N.Y. 1986).

34. 609 N.E.2d at 1202. This distinction is consistent with prior Indiana case law. See *Perfection Paint & Color Co. v. Konduris*, 258 N.E.2d 681 (Ind. Ct. App. 1970) (holding that there is no strict liability on the occasional seller of products who is not engaged in that activity as a part of his business).

35. 609 N.E.2d at 1202.

36. 605 N.E.2d 1186 (Ind. Ct. App. 1993).

line at Underly's request. As a result, high-pressure hydraulic oil was injected into Underly's hand. Underly sued the manufacturer of the retriever under the Product Liability Act, contending that the retriever was defective because Advance failed to post warnings on the retriever concerning the risk of injuries from hydraulic leaks and even encouraged users to make light repairs, such as replacing hydraulic hoses.³⁷ Advance raised the defense of misuse.³⁸

At trial, the vice-president of Advance testified that the manufacturer could foresee that users of its retriever would conduct light repairs, such as replacing a hydraulic hose. He also testified it was foreseeable that persons such as Underly could run their hands along the hose while the retriever was turned off in order to discover any worn spots or leaks. However, he testified that it was not only unforeseeable, but inconceivable that someone would find a worn spot in the hydraulic hose and then, with his finger on the hole, pressurize the line. He also testified that except for Underly, Advance had never experienced anyone else injuring himself in the same manner.³⁹

On appeal, Underly claimed error in several jury instructions on the defense of misuse. First, Underly objected to a misuse instruction that quoted verbatim the definition of misuse found in the Product Liability Act. Underly contended that this instruction was incomplete. He argued that if a manufacturer fails to warn about a latent danger and that failure proximately caused the plaintiff to use or handle the machine in a certain manner, the manufacturer should not be able to avoid liability for the injury with the defense of misuse. Underly tendered his own instructions expressing this concept.⁴⁰

37. *Id.* at 1188-89.

38. Under the Act, it is a complete defense to strict liability where "a cause of the physical harm is a misuse of the product by the claimant or any other person not reasonably expected by the seller at the time the seller sold or otherwise conveyed the product to another party." IND. CODE ANN. § 33-1-1.5-4(b)(2) (West Supp. 1993). "The key to a successful claim of misuse is whether the seller can prove that the misuse, from the seller's perspective, was not reasonably foreseeable." 605 N.E.2d at 1189 (citing *Hoffman v. E.W. Bliss Co.*, 448 N.E.2d 277, 283 (Ind. 1983) and *Montgomery Ward & Co. v. Gregg*, 554 N.E.2d 1145, 1156 (Ind. Ct. App. 1990)).

39. 605 N.E.2d at 1190.

40. *Id.* Underly's first tendered instruction read:

The failure of the plaintiff to discover a defect in a product, or failing to guard against the existence of a defect is not misuse of the product.

His second instruction stated:

If a manufacturer fails to warn about a latent danger, and the failure to warn about the latent danger proximately causes the plaintiff to use or handle the machine in certain [sic] manner, then the manufacturer may not avoid liability for the injury under the defense of misuse. Likewise, if a manufacturer fails to warn about a latent danger, and the failure to warn about the latent danger proximately causes the plaintiff to use or handle the machine in a certain manner, then the manufacturer may not avoid liability by claiming that the use, which was induced by its failure to warn, was not reasonably foreseeable.

Id. at 1191. A party is normally entitled to have a tendered instruction read to the jury if:

Rejecting Underly's argument, the court reasoned that the trial court's instruction, taken directly from the statutory definition of misuse, focused on the foreseeability of misuse from the seller's perspective, thereby foreclosing the possibility of any inquiry by the jury into the user's ability to discover or foresee the risks posed by the product.⁴¹ Although Underly's first instruction on misuse may have been more clear, it stated no principle of law not covered by the court's instruction.⁴² In addition, Underly's second instruction on misuse was an incorrect statement of law because it required a manufacturer or seller to always warn about latent dangers, irrespective of whether the plaintiff's use was reasonably foreseeable.⁴³ In contrast, the correct rule is that a seller has a duty to warn only when the seller knew or had reason to know that the product was likely to be dangerous when used in a foreseeable manner.⁴⁴

Underly also objected to Advance's jury instruction on the duty to warn and contended that the instruction improperly excluded the duty to warn when the user should have known of the danger in the product.⁴⁵ Underly argued that the "should have known" language injected an element of contributory negligence into a strict liability case.⁴⁶ Although the court determined the instruction was harmless in this particular case, it agreed that the instruction was an incorrect statement of law.⁴⁷

The instruction was taken from the court's decision in *Craven v. Niagara Machine and Tool Works, Inc.*⁴⁸ Since *Craven*, however, the Indiana Supreme Court rendered decisions in *Hinkle v. Niehaus Lumber Co.*⁴⁹ and *Koske v. Townsend Engineering Co.*,⁵⁰ which the court viewed as overruling the test set forth in *Craven*.⁵¹ In *Hinkle*, the supreme court stated that the seller does not

(1) the instruction is a correct statement of law; (2) it is supported by the evidence; (3) it does not repeat material adequately covered by other instructions; and (4) the substantial rights of the tendering party would be prejudiced by the failure to give the instruction.

Id. (citing *Miller Brewing Co. v. Best Beers of Bloomington, Inc.*, 579 N.E.2d 626, 635 (Ind. Ct. App. 1991)).

41. 605 N.E.2d at 1191-92.

42. *Id.* at 1192.

43. *Id.*

44. *Id.* (citing *Hinkle v. Niehaus Lumber Co.*, 525 N.E.2d 1243, 1245 (Ind. 1988)).

45. The instruction tendered by Advance stated:

A duty to warn arises when the manufacturer knows or should know of a danger involved in the use of its product, or where it is unreasonably dangerous to place the product in the hands of the user without suitable warning. However, where the danger or potentiality of danger is known or should be known to the user, the duty does not attach.

605 N.E.2d at 1192 (emphasis omitted).

46. *Id.*

47. *Id.* at 1193.

48. 417 N.E.2d 1165, 1169 (Ind. Ct. App. 1981).

49. 525 N.E.2d 1243 (Ind. 1988).

50. 551 N.E.2d 437 (Ind. 1990).

51. 605 N.E.2d at 1193.

have a duty to warn unless the seller "knew or had reason to know that the product was likely to be dangerous when used in a foreseeable manner."⁵² Thus, the court in *Hinkle* focused on the seller's ability to predict dangers in foreseeable uses of the product, rather than the user's ability to foresee such dangers.⁵³ Similarly, in *Koske*, the court stated that resorting to an objective standard to determine what a product user should have known is akin to the contributory negligence defense, which would otherwise not be available in strict liability.⁵⁴ Thus, the trial court's instruction that a manufacturer has no duty to warn of dangers which should have been known to the user was erroneous.

Unfortunately, despite these previous cases, the *Underly* decision contains a statement which arguably injects the should have know standard back into the equation. In its determination that the trial court's instruction was harmless error, the court found that insufficient evidence existed to show that Advance knew or had reason to know that the retriever presented a danger of hydraulic injection injury. As part of its analysis, the court stated:

In order to prevail on his claim for strict liability based upon Advance's failure to warn, it was incumbent upon Underly not only to present evidence to the jury that *ordinary users* of the retriever *would be unaware* of the danger of working around high pressure hydraulic hoses, but also to show that Advance knew or had reason to know that its retriever was fraught with such dangers when used in a foreseeable manner.⁵⁵

This language appears to set forth an objective standard to determine whether the user's knowledge will preclude the necessity for a warning by the seller. If the *Koske* and *Hinkle* rule is properly applied, evidence of whether ordinary users would or would not be aware of a danger is not relevant to whether a duty to warn exists. The appropriate test for when a duty to warn arises is whether the seller knows or has reason to know of a danger when the product is used in a foreseeable manner, regardless of the knowledge of ordinary users.⁵⁶ Only where the user has actual, subjective knowledge of the danger does the user's knowledge make a warning unnecessary. Thus, if the specific user does not actually know of a product's dangers, regardless of what an "ordinary user" knows, the seller has a duty to warn of those dangers so long as the danger is foreseeable to the seller. Otherwise, a seller could argue that a

52. 525 N.E.2d at 1245.

53. *Underly*, 605 N.E.2d at 1193.

54. 551 N.E.2d at 441.

55. 605 N.E.2d at 1193 (emphasis added).

56. In a strict liability case based on failure to warn, the threshold question is whether the seller "knew or had reason to know that the product was likely to be dangerous when used in a foreseeable manner." *Peters v. Judd Drugs, Inc.*, 602 N.E.2d 162, 164-65 (Ind. Ct. App. 1992) (citing *Hinkle*, 525 N.E.2d at 1245 (Ind. 1988)).

particular plaintiff should have known of a danger because ordinary users would have known. The jury could then infer that a specific user's lack of knowledge of a danger is tantamount to negligence. Such a result is inconsistent with the holdings in *Hinkle* and *Koske*.

IV. STATUTE OF LIMITATIONS AND THE DUTY TO WARN

In *Wenger v. Weldy*,⁵⁷ the Indiana Court of Appeals for the Third District affirmed summary judgment in favor of a lessor of modified farm equipment, based on the ten-year statute of repose contained in the Indiana Product Liability Act.⁵⁸ The defendant, a former farm implement dealer, retained a 1964 hay baler from his business inventory when he retired in 1964. In 1975, the hitch clevis on the hay baler broke. Having performed welding chores on his own equipment in the past, the defendant welded the hitch and continued to use the baler. In 1981, the defendant leased the baler to his son, who asked the plaintiff to assist in baling operations the next day. While the plaintiff rode in the wagon behind the bailer, the hitch broke, allowing the baler to detach from the wagon. As a result, the plaintiff was struck in the head by a piece of equipment.⁵⁹

The plaintiff argued that the defendant's act of welding the hitch in 1975 created a new product which recommenced the ten-year statutory limitation period, but that the period did not commence until 1981 when the defendant leased the equipment to his son. The court first noted that the defendant became the "initial user" of the equipment within the meaning of the statute in 1964 when he transferred the equipment from his business inventory to his farming operation.⁶⁰ Thereafter, if the equipment became a new product, it would have occurred when the hitch was welded in 1975. Relying on *Denu v. Western Gear Corp.*⁶¹ as instructive, the court found that if the modification of the hitch in 1975 constituted the creation of a new product, then both the injury in 1988 and the lawsuit in 1990 fell outside the recommenced ten-year period.⁶²

57. 605 N.E.2d 796 (Ind. Ct. App. 1993).

58. The Act provides that

a product liability action must be commenced within two (2) years after the cause of action accrues or within ten (10) years after the delivery of the product to the initial user or consumer. However, if the cause of action accrues at least eight (8) years but less than ten (10) years after the initial delivery, the action may be commenced at any time within two (2) years after the cause of action accrues.

IND. CODE ANN. § 33-1-1.5-5 (West Supp. 1992). The ten-year provision is a statute of repose. *Dague v. Piper Aircraft Corp.*, 418 N.E.2d 207, 210-11 (Ind. 1981).

59. 605 N.E.2d at 797.

60. *Id.* at 798. See IND. CODE ANN. § 33-1-1.5-5 (West Supp. 1992).

61. 581 F. Supp. 7 (S.D. Ind. 1983). In *Denu*, the court interpreted the product liability statute of limitations as allowing recommencement of the ten-year statutory period when a product has been reconditioned, altered, or modified to the extent that a "new" product has been introduced into the stream of commerce. *Id.* at 8.

62. 605 N.E.2d at 798.

Although not expressly stated in the opinion, the court's decision in *Wenger* assumed that because the defendant had been the initial user or consumer in 1964, he continued to be the initial user or consumer in 1975 after welding the hitch. Presumably, this is so because he continued to use the equipment for his own farming operations immediately after welding the hitch. However, a different result may have been reached if, immediately after welding the hitch, the defendant had placed the equipment in storage or private inventory for later sale or lease. Under those circumstances, his lease of the equipment in 1981 may have constituted delivery of the new product to a new "initial user or consumer," thereby recommencing the ten-year period in 1981 instead of 1975.

In another case which addressed the statute of repose, the United States Court of Appeals for the Seventh Circuit determined whether a claim based on a post-sale duty to warn is a product liability claim subject to the Product Liability Act's statute of limitations. In *Schamel v. Textron-Lycoming*,⁶³ the plaintiff brought a wrongful death action on behalf of her husband who died in 1988 in the crash of his 1959 Piper Comanche as a result of a fatigue failure in one of the connecting rods in the plane's engine. One of the plaintiff's claims was that the manufacturer of the rod failed to exercise reasonable care in providing adequate information to individuals overhauling its engines by not providing fatigue limits for the connecting rods in its overhaul and service manuals. The manufacturer had not sold that particular part since at least 1973.⁶⁴

In an effort to avoid the ten-year statute of repose, the plaintiff argued that her claim of post-sale failure to warn was not a product liability claim, but rather a claim under Section 324A of the Restatement (Second) of Torts.⁶⁵ Without determining whether a Section 324A action is a product liability suit for purposes of the Indiana Product Liability Act,⁶⁶ the Seventh Circuit held that the provision of service manuals and other sources of service information is not a

63. 1 F.3d 655 (7th Cir. 1993).

64. *Id.* at 656.

65. Section 324A of the RESTATEMENT (SECOND) OF TORTS states:

One who undertakes, gratuitously or for consideration, to render services to another which he should recognize as necessary for the protection of a third person or his things, is subject to liability to the third person for physical harm resulting from his failure to exercise reasonable care to protect his undertaking, if

- (a) his failure to exercise reasonable care increases the risk of such harm, or
- (b) he has undertaken to perform a duty owed by the other to the third person, or
- (c) the harm is suffered because of reliance of the other or the third person upon the undertaking.

RESTATEMENT (SECOND) OF TORTS § 324A (1965).

66. Citing *Baker v. Midland-Ross Corp.*, 508 N.E.2d 32 (Ind. Ct. App. 1987), the court stated that "[i]t may be that a Section 324A action is not a product liability suit for purposes of the Indiana Product Liability Act, since it may be that the injury does not result from the manufacture, construction, or design of a product, but rather from post-sale negligent acts." 1 F.3d at 657 (emphasis added).

separate and discrete, post-sale undertaking pursuant to Section 324A, but rather is information generally necessary to satisfy the manufacturer's duty to warn.⁶⁷ In her complaint, the plaintiff alleged that the defendant had a duty to provide the service information. Thus, the manufacturer's provision of such information was not a voluntary undertaking distinct from the obligations inherent in the sale of the product. The plaintiff's action was therefore based on the manufacturer's breach of its continuing duty to warn by not establishing a fatigue life for the connecting rods. Such a claim of failure to warn is a product liability action covered by the Product Liability Act and its statute of repose.⁶⁸

V. AUTHENTICATION OF PRODUCT, PROOF OF DEFECT, AND ADMISSIBILITY OF EMPLOYER'S CONDUCT

In *Bruther v. General Electric Co.*,⁶⁹ the plaintiff was electrocuted while changing a light bulb at his place of employment. When the plaintiff attempted to unscrew the bulb from its socket, the glass envelope separated from the base. The plaintiff brought suit against General Electric, the manufacturer of the light bulb, under theories of strict liability, negligence, breach of warranty, and failure to warn. General Electric moved for summary judgment, contending that (1) the plaintiff could not authenticate the bulb that he wished to introduce into evidence,⁷⁰ and (2) the plaintiff could not establish any evidence of a defect in the light bulb.⁷¹

On the authentication issue, General Electric argued that the plaintiff was unable to authenticate the bulb he offered into evidence because of the lack of identifying marks on the bulb and the existence of a gap in the chain of custody after the accident occurred. After the accident, no one safeguarded the bulb. Only after the plaintiff's counsel asked to examine the bulb did the plant manager begin to look for it. The plant manager found a broken bulb in a cabinet next to the accident site, but he could not identify the bulb as the one involved in the accident. He believed, however, that it was the bulb in question because he normally did not keep broken bulbs. The plaintiff stated in his affidavit that about two weeks before the accident he replaced light bulbs in the same panel with other General Electric bulbs and no other brand of light bulb was used in that panel. In addition, only six people had access to both the area where the accident occurred and the cabinet where the bulb was found.⁷²

67. 1 F.3d at 657.

68. *Id.*

69. 818 F. Supp. 1238 (S.D. Ind. 1993).

70. Although the specific issue here was whether the bulb offered into evidence had been properly authenticated, Plaintiff may well have been able to prove a product defect without ever having located the light bulb in question. See *SCM Corp. v. Letterer*, 448 N.E.2d 686 (Ind. Ct. App. 1983).

71. 818 F. Supp. at 1239.

72. *Id.* at 1240.

On these facts, the United States District Court for the Southern District of Indiana held that there was sufficient evidence within the meaning of Rule 901(a) of the Federal Rules of Evidence⁷³ such that a jury considering these facts reasonably could conclude that the bulb in question was the bulb that caused the plaintiff's injuries.⁷⁴ Citing *United States v. L'Allier*,⁷⁵ the court noted that "any discrepancies in the chain of custody go to the weight of the evidence, not its admissibility."⁷⁶ Consequently, the jury, not the court, must evaluate the significance of the plaintiff's inability to account for the bulb following the accident.⁷⁷

The second question presented on summary judgment in *Bruther* was whether the plaintiff had established any evidence of a defect in the light bulb. As support for its argument that no evidence of a defect existed, General Electric noted that the plaintiff had not produced an expert who would testify that the bulb was defective. In reviewing the record, the court noted that the nature of the alleged defect was not especially complicated. The plaintiff had stated in interrogatory answers that the glass part of the bulb came apart from the metal base while he was unscrewing the bulb, thereby exposing the electrical element. The person who removed the bulb from the socket after the accident corroborated the plaintiff's version of the facts by describing the base as having separated from the glass. Given the simplicity of the alleged defect, the court could find no requirement that the plaintiff produce an expert to bolster his allegations of defect.⁷⁸ Although the evidence presented to prove a defect was scant, the court nevertheless determined it to be sufficient to create a triable issue of fact to preclude summary judgment.⁷⁹

Finally, relying on *Moore v. General Motors Corp.*⁸⁰ and *Evans v. Schenk Cattle Co.*⁸¹, the *Bruther* court reaffirmed the Indiana rule that a defendant may introduce evidence to contest the elements of a negligence claim, even if that evidence is evidence of causation attributable to a party or parties who do not

73. FED. R. EVID. 901(a) states: "The requirement of authentication or identification as a condition precedent to admissibility is satisfied by evidence sufficient to support a finding that the matter in question is what its proponent claims." FED. R. EVID. 901(a).

74. 818 F. Supp. at 1240-41.

75. 838 F.2d 234, 242 (7th Cir. 1988).

76. 818 F. Supp. at 1241 (citing *United States v. Shackelford*, 738 F.2d 776, 785 (7th Cir. 1984)).

77. *Id.* A similar result would probably be reached under the Indiana Rules of Evidence. See *Fruehauf Trailer Div. v. Thornton*, 366 N.E.2d 21 (Ind. Ct. App. 1977); IND. R. EVID. § 901(a).

78. 818 F. Supp. at 1242. On the other hand, where the alleged defect is beyond the understanding of the average layperson, some courts have required that the defect be proven through expert testimony. See *Worsham v. A.H. Robins Co.*, 734 F.2d 676 (11th Cir. 1984); *Padgett v. Synthes, Ltd.*, 677 F. Supp. 1329 (W.D.N.C. 1988); *Northern Trust Co. v. Upjohn Co.*, 572 N.E.2d 1030 (Ill. App. Ct. 1991).

79. 818 F. Supp. at 1241-42.

80. 684 F. Supp. 220 (S.D. Ind. 1988).

81. 558 N.E.2d 892 (Ind. Ct. App. 1990).

qualify as nonparties under Indiana's Comparative Fault Act.⁸² An employer's fault thus may be considered by the jury to refute the plaintiff's claim of negligence, but may not be used to reduce the plaintiff's damages award.⁸³

82. IND. CODE ANN. §§ 34-4-33-1 to -13 (West 1988 & West Supp. 1992).

83. 818 F. Supp. at 1243.

1993 DEVELOPMENTS IN INDIANA PROPERTY LAW

WALTER KRIEGER*

I. CONCURRENT OWNERSHIP: JOINT BANK ACCOUNTS

Indiana's Non-Probate Transfer Act¹ provides that upon the death of a party to a joint account, the funds in the account belong to the surviving party or parties as against the estate of the deceased party unless there is clear and convincing evidence of a different intent at the time the account was created.² The Indiana law governing rights of survivorship in joint accounts continues to slowly develop.

Last year, in *Voss v. Lynd*,³ the Indiana Court of Appeals held that the removal of the wife's name from joint certificates of deposit (CDs) by the husband without the wife's consent did not destroy her right of survivorship, and that upon the death of the husband, the CDs passed to the wife. In *dictum*, *Voss* suggests that had the husband cashed in the CDs (closed the joint account by removing the funds), the wife would have been entitled to recover the funds from the estate of the deceased husband because one party to a multiple-party account has no right to withdraw all the funds without the consent of the other parties to the account.⁴

This year the *dictum* in *Voss* almost became law. In *Shourek v. Stirling*,⁵ Lillian Jonas added the name of her late husband's niece, Suzanne Stirling, to several of her bank accounts, including a checking account and four CD's. A few hours before Jonas' death, Suzanne closed out the checking account and cashed the CDs. Suzanne and her husband Jack made all the funeral arrangements, and Jack was appointed administrator of Jonas' estate. Later, when it was discovered that Jonas had a son, Frank Shourek, Jack withdrew as administrator of Jonas' estate and Shourek was named successor administrator. Shourek brought this action alleging that Suzanne and Jack had converted the funds in the joint accounts. The trial court granted summary judgment in favor of the Stirlings and Shourek appealed.⁶

* Associate Professor of Law, Indiana University School of Law—Indianapolis. A.B., 1959, Bellarmine College; J.D., 1962, University of Louisville; LL.M., 1969, George Washington University.

1. IND. CODE § 32-4-1.5 (1979 & Supp. 1993).

2. IND. CODE § 32-4-1.5-4 (1979). The term "joint account" is defined as a contract of deposit in a financial institution payable on request to any one or more of the parties. IND. CODE § 32-4-1.5-1(4).

3. 583 N.E.2d 1239 (Ind. Ct. App. 1992).

4. For a discussion of the *Voss* decision see Walter W. Krieger, *Recent Developments in Indiana Property Law*, 26 IND. L. REV. 1114, 1114-16 (1993).

5. 607 N.E.2d 402 (Ind. App. 1993).

6. *Id.* at 403-04.

The court of appeals, in affirming the granting of the summary judgment, observed that in order to maintain an action for conversion, the estate must prove an immediate and unqualified right to possession of the property. While she lived, Jonas could have maintained an action for conversion against Suzanne for removing the funds from the account, because during the lifetime of all the parties to the account, the funds belong to the parties in proportion to their net contributions, and Jonas had contributed all the funds to the account. However, when Jonas died, her interest in the account died with her and the funds in the account then became Suzanne's.⁷

In a dissenting opinion Judge Staton observed that only "sums remaining on deposit at the death of a party to a joint account belong to the surviving party or parties as against the estate of the deceased party."⁸ When Suzanne withdrew the funds before Jonas' death, she also withdrew the survivorship protection of the statute, and the portion of the funds which belonged to Jonas during her lifetime passes to her estate. Since Suzanne had not contributed any of the funds in the account, she had no ownership interest in the funds withdrawn before Jonas' death.⁹ No one can dispute the logic of Judge Staton's argument, and in fact, there are decisions from other jurisdictions which support his position.¹⁰ Nevertheless, the majority opinion followed the rationale of *Voss* that one party to a multiple-party account can not destroy the right of survivorship by withdrawing all the funds from the account without the other party's consent. Thus, even though Suzanne removed the funds belonging to Jonas from the account, and Jonas could have sued her for conversion while she lived, once Jonas died her interest in the account died with her and Suzanne, as the surviving joint owner, was entitled to all the funds. The only problem with this rationale, as Judge Staton points out, is that it conflicts with the wording of Indiana Code section 32-4-1.5-4(a), which expressly limits the right of survivorship to "sums remaining on deposit at the death of a party."¹¹ Here there were no sums remaining on deposit upon which the statute could operate.

After the survey period had ended, the Indiana Supreme Court granted transfer, set aside the court of appeals opinion, reversed the trial court's grant of summary judgment in favor of the Stirlings, and remanded the case for further

7. *Id.* at 404.

8. *Id.* at 405 (Staton, J., dissenting) (quoting IND. CODE § 32-4-1.5-4(a)).

9. *Shourek*, 607 N.E.2d at 405 (Staton, J., dissenting).

10. See, e.g., *Wiggins v. Parson*, 446 So.2d 169 (Fla. Dist. Ct. App. 1984) (the "better rule" is that the withdrawal of all the funds by one of the parties destroys the right of survivorship); *In re Estate of Kohn*, 168 N.W.2d 812 (Wisc. 1969) (the withdrawal of the funds severed the joint tenancy and the funds contributed by the deceased party and wrongfully withdrawn by the survivor belonged to the estate of the deceased party to the account).

11. *Shourek*, 607 N.E.2d at 405 (Staton, J., dissenting) (quoting IND. CODE § 32-4-1.5-4(a)).

proceedings consistent with the opinion.¹² In reversing the summary judgment in favor of the Stirlings, the supreme court adopted the rationale of Judge Staton's dissent in the court of appeals opinion. Since Suzanne Stirling had removed all the funds from the joint accounts before the death of Jonas, the presumption that funds in a joint account at the death of a party to the account belong to the survivor does not apply. However, even though Stirling could no longer rely upon the presumption of survivorship the court noted that there was evidence suggesting that Jonas' intent was to make a present gift of the funds to Stirling subject to the availability of these funds for Jonas' immediate needs. In addition to Suzanne Stirling's authority to make withdrawals, the Stirlings were given physical possession of some of the CDs, and a key to Jonas' house with instructions as to where to find the passbooks for the remaining joint accounts.¹³

Should the act of removing the funds from the account a few hours, or even a few days before the death of the other party, result in the termination of the right of survivorship in the intended beneficiary? To those untrained in the law it may appear prudent to withdraw all the funds from the account before the death of the other party to avoid having the account frozen for an indefinite period of time by the bank, the executor of the estate of the deceased party, or the Indiana Department of Revenue. To hold that this seemingly harmless act by the surviving party results in the loss of the right to the funds withdrawn appears rather harsh and may furnish a sufficient rationale for the majority opinion of the court of appeals.

II. EASEMENTS; PRESCRIPTIVE

To acquire a prescriptive easement it is necessary to show actual, hostile, open, notorious, continuous, uninterrupted, adverse use for a period of twenty years under a claim of right or by continuous adverse use with knowledge and acquiescence of the owner of the servient estate.¹⁴ In *Bauer v. Harris*,¹⁵ the court discussed the nature and extent of the use needed to acquire a prescriptive

12. *Shourek v. Stirling*, 621 N.E.2d 1107 (Ind. 1993).

13. *Id.* at 1110.

14. IND. CODE § 32-5-1-1 (1979). *Greenco, Inc. v. May*, 506 N.E.2d 42, 45 (Ind. Ct. App. 1987); *Searcy v. LaGrottee*, 372 N.E.2d 755, 757 (Ind. Ct. App. 1978).

15. 617 N.E.2d 923 (Ind. Ct. App. 1993).

easement.¹⁶ The court focused on three elements: the exclusivity, the continuity and the adversity of the use.

The Bauers claimed a prescriptive right to use a twelve foot wide path or driveway across the southern portion of the land of their neighbors, the Harrises. The Bauers had used the driveway since 1904 to gain access to their property from a road to the east of the Harrises' land. From 1904 until 1940 a railroad was in service along the east/west boundary between the Bauer and Harris properties and the public used the driveway for access to the railroad. The Bauers operated a granary business on their property until 1921, and their customers also used the driveway for access to the Bauers' property. From 1921 until 1945 the granary facility was used as a barn for storing farm implements and from the 1930's until 1979 the Bauers leased a driveway across their land to a neighbor for access to the neighbor's garage. In order for the neighbor to use the driveway across the Bauers' property, it was necessary for him to use the driveway across the Harris property. The Bauers leased their property in 1987 to the Peyronnin Construction Company, which also used the driveway across the Harrises' property to gain access to the Bauers' property and placed gravel over the driveway to facilitate traffic. The Harrises acquired title to the servient estate in March 1989 and Peyronnin complied with the Harrises' request to remove the gravel and plant grass over the Driveway. In May 1989, after the Harrises had protested the location of a sign advertising the sale of the Bauers' property, the Harrises placed a fence across the Driveway. The Bauers then filed this suit.¹⁷

The trial court found that the Bauers had failed to prove their use of the Driveway was exclusive, continuous and under a claim of right and entered judgment for the Harrises. The Bauers appeal.¹⁸

The trial court found that the use of the easement by the Bauers was not exclusive because during the statutory period the path was also used by members of the general public.¹⁹ This interpretation of exclusivity was rejected by the court of appeals. Use by members of the general public does not render another use of the easement non-exclusive. Exclusivity does not require that the driveway be used solely by the claimant. Instead, it requires only that the use

16. Indiana courts have noted that, except for the statutory periods, the elements necessary to establish a prescriptive easement and those need to acquire title to the land of another by adverse possession are virtually identical. *Bauer*, 617 N.E.2d at 930 n.4; *Marathon Petroleum Co. v. Colonial Motel Properties, Inc.*, 550 N.E.2d 778, 782 n.2 (Ind. Ct. App. 1990). While the statutory period to acquire title by adverse possession is only ten years, IND. CODE § 34-1-2-2(6) (1979), the statutory period required to establish a prescriptive easement is twenty years, IND. CODE § 32-5-1-1 (1979).

17. *Bauer*, 617 N.E.2d at 925-26.

18. *Id.*

19. The trial court reached this conclusion through an interpretation of the language in *DeShields v. Joest*, 34 N.E.2d 168 (Ind. App. 1941) (must be exclusive as against the right of the community at large). *Bauer*, 617 N.E.2d at 927.

by the claimant not be dependant upon the right of others to use the driveway. The Bauers did not rely upon the right as a member of the general public to use the easement, but used the driveway for their personal and business purposes. It was irrelevant that others were also using the easement at the same time.²⁰ In addition, the use of the driveway by the general public ended in 1940, while the use by the customers and lessees of the Bauers continued until 1989.²¹

Next the court examined the requirement that the prescriptive use be continuous. The trial court made two findings of fact relevant to this issue. First, the court found that prior to 1945 the Bauers' predecessors in title had maintained a garden on their property and rented the property to other members of the general public for farming. The driveway across the Harris property was used to gain access to the Bauers' property. The court's second finding was that from 1960 to the present the Bauers and their predecessors hayed and mowed the property twice each year. Based on these findings the trial court concluded that the use "was intermittent and occasional, not continuous and uninterrupted."²² The court of appeals did not agree with the trial court's conclusion. Continuous use does not necessarily mean constant, and a mere intermissions in use of a reasonable duration does not constitute an abandonment. The easement was used consistent with the nature of the use of the dominant estate.²³

Furthermore, the court observed that under certain circumstances the use of an easement by members of the general public can actually support a claim to a prescriptive easement.²⁴ The court distinguished between an indiscriminate use of property by the general public, which indirectly benefits a business owner who does not own the property, and a situation in which the owner of a business directs members of the public who are customers, lessees, or invitees, to use the property over which he claims an easement. In the former situation the owner of the business can not claim an easement based upon the indirect benefit of the general public's voluntary use of the property. In the latter situation, however, the direction to customers, lessees, or invitee of the business to use the property is attributable to and derivative of the business owner's claim.²⁵ The court of

20. *Id.* at 927-28.

21. *Id.* at 928.

22. *Id.* at 928-29.

23. *Id.* at 929. The court held that "no intent to abandon the use of the easement can reasonably be inferred from mere lapses in use during those periods when haying, mowing, gardening and farming were not in season." *Id.* The court noted that in *Bromelmeier v. Brookhart*, 570 N.E.2d 90 (Ind. Ct. App. 1991), *trans. denied*, the non-use of a pier for two years while it was being repaired was not an abandonment of the easement and did not stop the statutory period from running.

24. *Id.*

25. *Id.* at 929-30. The court cited *Greenco, Inc. v. May*, 506 N.E.2d 42 (Ind. App. 1987) as an example of the former situation. Members of the general public, and not just customers of the business, used parking lot without any direction from the owner of the business. The court held that

appeals determined that the trial court's findings did not support its conclusion that the Bauers' use of the driveway was not continuous for the statutory period.²⁶

The trial court also concluded that the use by the Bauers was permissive and not adverse. In rejecting this finding, the court of appeals observed that once open and continuous use of the land of another commences with the knowledge of the owner, such use is presumed to be adverse.²⁷ Thus it was not necessary for the Bauers to formally assert a claim. The trial court's findings that the driveway was used to facilitate the Bauers' family business, and that Bauers' lessees had used the driveway for access to the Bauers' property could lead to only one inference: "[T]hat the Harrises acquiesced in the Bauers' use of the Harris property as a means of access, not that the Harrises gave the Bauers permission to use their property."²⁸

Finally, the court examined the extent and purpose of the use during the statutory period to determine the scope of the easement acquired by prescription. The nature and extent of the right acquired by prescription is determined by the actual use during the period of prescription. The court noted that the width of the driveway was twelve feet wide at the time of its creation and was used by the Bauers and their lessees to gain access to the Bauers' property.²⁹

The court concluded that the findings of fact did not support the trial court's judgment in favor of the Harrises, but instead supported the Bauers' claim to a twelve foot wide prescriptive easement over the Harrises' property. The judgment was reversed and the case remanded for proceedings consistent with the opinion.³⁰

III. GIFTS OF LAND

In *Walter v. Balogh*,³¹ the Indiana Supreme Court set aside a court of appeals opinion³² which concluded that the trial court had exceeded its equitable jurisdiction in ordering completion of an intended inter vivos gift of land.³³ In

no easement resulted from such voluntary use by the general public. *Id.* at 46. The court cited *Marathon Petroleum Co. v. Colonial Motel Properties, Inc.*, 550 N.E.2d 778 (Ind. App. 1990) as an example of the latter situation. The court found adverse possession of property where the business owner directed its patrons to park on the property and prohibited non customers from using the lot. *Id.* at 782-84.

26. *Bauer*, 617 N.E.2d at 930.

27. *Id.* at 930 (citing *Searcy v. LaGrotte*, 372 N.E.2d 755, 757 (Ind. Ct. App. 1978)).

28. *Bauer*, 617 N.E.2d at 930-31.

29. *Id.* at 931-32.

30. *Id.* at 932.

31. 619 N.E.2d 566 (Ind. 1993).

32. *Walter v. Balogh*, 604 N.E.2d 1226 (Ind. Ct. App. 1992).

33. *Id.* at 1234-36.

setting aside the court of appeals opinion and affirming the judgment of the trial court, the supreme court relied on the maxims “equity looks to the substance and not the form” and “equity requires to be done that which in good conscience ought to be done.”³⁴

In 1984, Alwilda Walter, a seventy-nine year old widow with no children, contacted her attorney about making a gift to Barry Hoeppner and his business partner Mark Balogh, of the 600 acres of Walter’s land that they were farming. Barry and Mark were close friends of Alwilda and her late husband, Martin, who died in 1983. Alwilda’s attorney advised her that an immediate gift of the land would result in a large gift tax liability. To lessen this tax liability, Alwilda’s attorney drafted conditional sales contracts conveying the land to Barry and Mark and their spouses. Alwilda intended to forgive the payments under the contracts as they became due each year, thus taking maximum advantage of the annual gift tax allowance.³⁵ Unfortunately, after the contracts had been executed, Alwilda’s attorney discovered that the stated contract price was less than half the fair market value of the land and that the immediate tax liability resulting from the difference between the fair market value and the sales price would exhaust Alwilda’s unified gift and estate tax credit. To solve this problem she suggested the 1984 agreement should be redrafted. In 1985, a new agreement, consisting of a series of notes and mortgages, was drafted. As part of the new agreement, Alwilda executed a Second Codicil to her will agreeing to forgive any indebtedness owed by the transferees at her death.³⁶

In June 1984, Alwilda, who was then eighty-four years of age, became confused and forgetful and her niece became involved in her financial affairs. Alwilda named her niece as her attorney and revoked the provision in the Second Codicil to her will forgiving any balance of the Baloghs’ and Hoeppners’ indebtedness under the 1985 notes upon her death. In August 1988, the Fort Wayne National Bank was appointed guardian of Alwilda’s estate, and as her guardian the bank issued a notice of default on the notes and mortgages. Appellees then filed the present action for declaratory judgment, requesting that the 1985 notes and mortgages be declared null and void, and that the 1984 land contract be reinstated. The trial court found that Alwilda intended the gift to be immediately effective in 1984, and that she never had any intent of collecting any payments under the contract. Alwilda’s revocation of the provision in the Second Codicil to her will forgiving any indebtedness due at her death was a

34. *Walter*, 619 N.E.2d at 568-69.

35. *Id.* at 567. The supreme court opinion is deliberately short and sketchy “in the interest of space,” and the court recommends that the reader interested in a more detailed discussion of the facts of the case or the trial court judgment should consult the court of appeals opinion. *Id.* at 569.

36. *Id.* at 567. For a more detailed discussion see *Walter*, 604 N.E.2d at 1229-30.

failure of consideration for the 1985 notes and mortgages and rendered them null and void.³⁷

The court of appeals, however, found that the trial court had exceeded its equitable jurisdiction in ordering that the notes and mortgages be set aside and in reinstating the 1984 agreement. The 1984 agreement was without consideration and was intended to convey title at a future date. It was unenforceable and insufficient to establish a gift inter vivos and the trial court's conclusion that the gift was complete and fully vested was clearly erroneous.³⁸ The Indiana Supreme Court did not agree. While finding that the court of appeals opinion did "an excellent job of setting forth the law concerning arms-length contracts between parties and the law concerning conditional gifts," the supreme court agreed with the trial court that Alwilda had no intent of exercising control over the property after 1984, and that the gift was meted out piecemeal for the sole purpose of taking advantage of the gift tax situation. The handling of Alwilda's affairs by her niece and the bank under the 1985 agreement would have defeated her intended purpose to make a gift of the land to the plaintiffs.³⁹ The supreme court also agreed with the trial court that Alwilda's revocation of the Second Codicil was a failure of consideration for the 1985 promissory notes and mortgages, rendering them invalid and reinstating the 1984 real estate contract.⁴⁰

Finally, the appellants claimed that the undue influence practiced on Alwilda by Howard Hoepfner, the father of the plaintiff Barry Hoepfner, warranted the rescission of all documents, an accounting, and a return of all property.⁴¹ The court found there was no evidence that Howard Hoepfner had used his power of attorney to defraud Alwilda or that he had failed to account to her for his actions as her attorney in fact. The trial court's judgment was affirmed.⁴²

37. *Id.* at 1230-32.

38. *Id.* at 1232-36.

39. *Walter*, 619 N.E.2d at 568-69.

40. *Id.* at 569.

41. *Id.* at 569; *Walter*, 604 N.E.2d at 1233. Howard Hoepfner had been a close and trusted friend of Alwilda and her husband Martin for many years. After Martin's death in 1983, Alwilda executed a Durable Power of Attorney naming Howard her attorney in fact, and also named him personal representative of her estate in her 1983 will. *Id.* at 1228. The appellants claimed that this fiduciary relationship created a presumption of undue influence with regard to the gift to his son Barry. The court of appeals agreed and remanded for a determination as to whether this presumption had been overcome. *Id.* at 1233-34. The supreme court found no evidence to suggest undue influence and saw no need to remand for further findings of fact. 619 N.E. 2d at 569.

42. *Id.* at 569.

In a second decision involving a gift of land, *Womack v. Womack*,⁴³ the trial court found that an elderly husband had given real estate to his wife as a gift and that his wife was not guilty of undue influence.⁴⁴

On appeal the husband argued that the trial court was in error when it found no undue influence by the wife. The court of appeals observed that, in Indiana, transactions between parties to certain legal and domestic confidential relationships give rise to a presumption of constructive fraud where it is shown that the transaction resulted in an advantage to the dominant party.⁴⁵ Among the confidential relationships often cited as giving rise to a rebuttable presumption of constructive fraud are attorney and client, guardian and ward, principal and agent, pastor and parishioner, husband and wife, and parent and child.⁴⁶ The law presumes that the first party (the attorney, the guardian, the principal, the pastor, the parent) is dominant and that the second party (the client, the ward, the agent, the parishioner, the child) is subordinate.⁴⁷ However, the court concluded that times have changed and the law should no longer presume that one party in the marital relationship is dominant and the other subordinate: "Instead, the burden of proving undue influence remains on the party seeking to set aside the transaction."⁴⁸ Here, the trial court found no evidence of undue influence on the part of the wife.

Finally the court addressed the issue of the husband's competency at the time of the alleged gift to the wife. The marriage took place in January, 1988 and the husband purchased the property in question in September, 1990. The opinion indicates that the marriage lasted only twenty months, and that at the time of the action for dissolution, the husband was eighty-five years old and the wife was seventy-eight. Both parties appeared to be "less than fully alert." Each gave the wrong year of their marriage to their attorneys, the wife thought the "pre-nuptial agreement" was drafted by Congressman Lee Hamilton instead of Bob Hamilton, a local attorney, and the husband could not remember that he lived in Seymour, Indiana.⁴⁹ While the husband was in poor health since his fall in July or early August of 1990, the evidence indicated that he appeared to

43. 605 N.E.2d 221 (Ind. Ct. App. 1992).

44. *Id.* at 222.

45. *Id.* at 224.

46. *Id.* (quoting *Lucas v. Frazee*, 471 N.E.2d 1163, 1167 (Ind. Ct. App. 1984)).

47. *Womack*, 605 N.E.2d at 224 (citing *Lucas*, 471 N.E.2d at 1167).

48. *Womack*, 605 N.E.2d at 225. A subsequent court of appeals opinion, *Matter of Estate of Goins*, 615 N.E.2d 897 (Ind. Ct. App. 1993) found that the wife had overcome the presumption of undue influence and therefore it was not necessary to "decide whether we agree with the reasoning employed by the *Womack* court." *Id.* at 900. However, the court noted *McClamrock v. McClamrock*, 476 N.E.2d 514 (Ind. Ct. App. 1985), had reached a different result regarding the presumption of undue influence between a husband and wife. *Id.* at 900 n.1.

49. *Womack*, 605 N.E.2d at 222 n.1.

be quite lucid when he made the loan with the bank about three days after the Labor Day weekend of 1990. Title to the property was placed in the wife's name on September 14, 1990. Two weeks later, the husband filed a petition to dissolve the marriage. The court found the evidence sufficient to support the finding that the transaction was a valid gift and that the wife was entitled to the property. Judgment affirmed.⁵⁰

IV. LANDLORD AND TENANT

A. Liability of Landlord for Conditions on Leased Premises

Indiana continues to adhere to the common law rule that the landlord is not liable for injuries to the tenant or his guests caused by defective conditions on the leased premises where the tenant is in control and possession of the premises. However, a number of exceptions to the landlord's tort immunity have developed over the years.⁵¹ In *Dickison v. Hargitt*,⁵² the court examined two of these exceptions to the non-liability rule.

Dickison, the tenant's (Moody's) social guest sued the landlord (Hargitt) for injuries sustained when he fell through an alleged rotted wooden balcony railing. The trial court granted the landlord's motion for judgment on the evidence because the plaintiff had failed to show Hargitt was negligent and because the plaintiff's own conduct precluded recovery. Plaintiff appealed.⁵³

The court of appeals first addressed the negligence issue. At common law the rule of caveat lessee applied: "[A] landlord who gives a tenant full control and possession of the leased property generally will not be liable for personal injuries sustained by the tenant or other persons lawfully upon the leased premises."⁵⁴ Having said this, the court then noted two exceptions to the doctrine of caveat lessee: (1) where the landlord knows of a hidden defect unknown to the tenant and fails to warn the tenant; and (2) where the landlord agrees to make repairs and either fails to do so or repairs negligently.⁵⁵

With regard to "hidden defects" known to the landlord and unknown to the tenant, the court observed that it is first necessary to show the landlord had actual knowledge of the hidden defect before the landlord can be charged with

50. *Id.* at 225-26.

51. For a general discussion of Indiana's exceptions to the common law rule that the landlord is immune from tort liability for injuries caused by defective conditions on the leased premises see Walter W. Krieger, *Recent Developments in Property Law*, 24 IND. L. REV. 1065, 1085-90 (1991).

52. 611 N.E.2d 691 (Ind. Ct. App. 1993).

53. *Id.* at 693.

54. *Id.* at 694.

55. *Id.*

a duty to warn the tenant.⁵⁶ The fact that the landlord should have known is not sufficient.⁵⁷ Here, however, the court found that there were sufficient facts from which a jury might infer the landlord had actual knowledge of a hidden defect.⁵⁸ Dickison introduced photographs showing dark spots on the wood railing, most likely caused by moisture, and a small piece of rotted wood collected by a friend from the wooden railing. This evidence suggested a defective railing. However, Dickison established that the dark spots were inconspicuous and that the railing appeared normal but in need of painting. Thus the jury could find that Dickison was unaware of the defect. Hargitt on the other hand, admitted that he knew the railing was made of pine, a soft wood prone to water damage, and that he had warned the tenant to be careful when using the balcony. Further, he had inspected the railing twice, once when he bought the property the previous year and once with Moody when she became a tenant. Hargitt also admitted that he possessed a trained eye in matters of the condition of wood. He held a degree in civil engineering, owned a residential construction business and had refurbished old balconies. From these facts the court concluded a jury could reasonably infer that Hargitt had actual knowledge of the hidden condition, that the plaintiff was unaware of the hidden condition, that Hargitt failed to warn anyone of the condition, and that the condition was the proximate cause of the injury. The court also found that the statement to Moody to be careful while using the balcony was not sufficient to fulfill Hargitt's obligation to warn her of the defective condition of the railing.⁵⁹

Dickison further contended that in addition to his duty to warn of the defective condition, Hargitt had a duty to repair the balcony. In response, the court observed that "a landlord has no duty to undertake repairs of premises in the tenant's exclusive possession unless the landlord agrees to do so by contract or otherwise."⁶⁰ Here there was an issue of fact as to whether Hargitt had

56. *Id.* at 695.

57. *Id.*

58. *Id.* at 695-96.

59. *Id.* at 694-97.

60. *Id.* at 697. Indiana courts continue to repeat this no duty to repair rule. E.g., *Childress v. Bowser*, 546 N.E.2d 1221 (Ind. 1989); *Zimmerman v. Moore*, 441 N.E.2d 690 (Ind. Ct. App. 1982). Such a rule seems inconsistent with Indiana's recognition of an implied warranty of habitability in residential leases. E.g., *Breezewood Management Co. v. Maltbie*, 411 N.E.2d 670 (Ind. Ct. App. 1980). It is generally recognized that the implied warranty of habitability requires the landlord to maintain the premises in a habitable condition throughout the term of the lease. E.g., *Javins v. First Nat'l Realty Corp.*, 428 F.2d 1071 (D.C. Cir 1970), *cert denied*, 400 U.S. 925 (1970) (the old nonrepair rule cannot coexist with obligations imposed upon landlord by typical modern housing code); *Glasoe v. Trinkle*, 479 N.E.2d 915 (Ill. 1985) (warranty requires that the dwelling remain habitable throughout the term of the lease); *Mease v. Fox*, 200 N.W.2d 791 (Iowa 1972) (warranty of habitability creates a continuing duty on part of landlord to maintain the habitability of the dwelling throughout the term of the lease); *Marini v. Ireland*, 265 A.2d 526 (N.J. 1970) (premises

agreed to make repairs to the apartment. However, the court noted that even if the jury found that Hargitt had agreed to make repairs this would not create a duty "to search Moody's premises for hidden defects," and proof of his actual knowledge of the defective condition would still be necessary to find a breach of his duty to repair.⁶¹

Finally, the court addressed the issue of whether Dickison's own conduct precluded recovery. Dickison admitted to drinking several beers and smoking marijuana. He was attempting to kiss Moody at the time of the injury and slipped on some twigs or branches on the balcony floor as he took a step towards her and fell against the railing. The trial court characterized Dickison's injuries as "self-inflicted," and concluded that under Indiana's Comparative Fault Act, Indiana Code section 34-4-33-1 et. seq., recovery for his intentional acts is not allowed.⁶² The court of appeals, however, found that while Dickison had intentionally drank beer and smoked marijuana, "he did not intentionally fall through the defective railing and crack his head open."⁶³ Thus Dickison's conduct did not bar his recovery as a matter of law.

B. Security Deposits Statute

In *Raider v. Pea*,⁶⁴ the landlord (Pea) sued for rent and damages in a small claims court and the tenants (the Raiders) counterclaimed for the return of their \$300 security deposit, attorney fees, and court costs.⁶⁵ The counterclaim was based on the landlord's failure to comply with the notice of damages provisions of the Security Deposits statute.⁶⁶ Failure to comply with the notice of damages requirement constitutes an agreement by the landlord that no damages are due, and the landlord must return the full security deposit to the tenant.⁶⁷ If the landlord fails to return the security deposit to the tenant, the tenant may recover the security deposit from the landlord together with reasonable attorney fees and

must remain habitable throughout the term of the lease). Therefore, one could conclude that the warranty creates an implied covenant to repair and that the landlord has a duty to repair without an express agreement to do so in the lease.

61. *Id.* at 697.

62. *Id.* at 697-98. Under Indiana's Comparative Fault Act recovery for intentional acts is not allowed. IND. CODE § 34-4-33-1 (West Supp. 1993).

63. *Id.* at 698.

64. 613 N.E.2d 870 (Ind. Ct. App. 1993).

65. *Id.* at 871.

66. The Security Deposits statute requires the landlord to mail to the tenant within 45 days after termination of the rental agreement and delivery of possession, a written itemized list of any damages claimed for which the security deposit is being applied, together with a check for the difference between the damages claimed and the amount of the security deposit being held by the landlord. IND. CODE §§ 32-7-5-12 (West Supp. 1993).

67. IND. CODE § 32-7-5-15 (West Supp. 1993).

court costs.⁶⁸ The landlord raised, as a defense to the counterclaim, the tenants' failure to provide him with their new mailing address as required by Indiana Code section 32-7-5-12(a)(3): "[L]andlord is not liable under this subsection until supplied by the tenant with a mailing address to which to deliver the notice and amount prescribed by this subsection."⁶⁹ Pea testified that he had attempted unsuccessfully to obtain the Raiders' new address and that he was able to file his claim for rent and damages only upon learning they had returned to Rushville. The tenants responded that they had left a change of address with the U.S. Post Office and had informed the landlord they were moving to St. Louis, Missouri. After hearing this evidence, the trial court awarded the landlord \$300 damages and denied the tenants' counterclaim. The tenants appealed.⁷⁰

The court of appeals noted that an ambiguity is created by the Security Deposits statute.⁷¹ The obligation of the landlord to provide an itemized statement of damages to the tenant within forty-five (45) days after the tenant's termination of occupancy, is contained in both Indiana Code sections 32-7-5-12(a)(3) and 32-7-5-14, but the duty of the tenant to provide the landlord with a mailing address to which to deliver the notice is set forth only in Indiana Code section 32-7-5-12(a)(3). The court found the wording of the statute unclear as to when the tenant's duty to supply the mailing address to the landlord should apply. In resolving this apparent ambiguity, the court adopted the general rules of statutory construction which requires that the wording of a single section of a statute is to be considered in the context of the entire statute, and that where two statutory provisions cover the same subject they are to be harmonized where possible to avoid an absurd result "that the legislature, as a reasonable body could not have intended."⁷² Applying these rules, the court determined that the tenant's obligation to provide the landlord with a new mailing address applied to all provisions of the statute which obligate the landlord to provide the forty-five days notice of damages.⁷³

The court also rejected the tenants' argument that supplying the U.S. Post Office with a forwarding address as well as informing the landlord they were moving to St. Louis, Missouri, were sufficient to satisfy the mailing address requirement of the statute.⁷⁴ The wording of the statute requires that the landlord be "supplied" with the tenant's the new mailing address, and the new

68. IND. CODE §§ 32-7-5-12(b), 32-7-5-16 (West Supp. 1993).

69. *Id.*

70. *Raider*, 613 N.E.2d at 871-72.

71. *Id.* at 872.

72. *Id.* at 872.

73. *Id.* at 873.

74. *Id.*

address was never delivered to the landlord.⁷⁵ Thus the forty-five day notice period never commenced to run. Judgment affirmed.⁷⁶

V. LEGISLATION

A. Residential Real Estate Sales Disclosure

During the 1993 session the Indiana legislature passed several statutes affecting the sale of residential real estate. Indiana Code section 24-4.6-2⁷⁷ provides that an owner of residential real estate "must complete and sign a disclosure form and submit the form to a prospective buyer before an offer is accepted for the sale of the residential real estate."⁷⁸ However, because no disclosure form now exists, and the legislation gives the Indiana real estate commission until April 30, 1994, to draft a disclosure form that meets the requirements of Indiana Code section 24-4.6-2, the "owner is not required to provide a disclosure form to a prospective buyer of residential real estate in transactions where offers to purchase are accepted before July 1, 1994."⁷⁹

The statute requires that the disclosure form contain a disclosure by the owner of known conditions in the following areas: the foundation; mechanical systems; roof; structure; water and sewer systems, and "[o]ther areas that the Indiana real estate commission determines are appropriate."⁸⁰ In addition, the disclosure form is to contain a notice to the prospective buyer in substantially the following language:

The prospective buyer and the owner may wish to obtain professional advice or inspections of the property and provide for appropriate provisions in a contract between them concerning any advice, inspections, defects, or warranties obtained on the property.

75. *Id.*

76. *Id.*

77. Pub. L. No. 209-1993.

78. IND. CODE § 24-4.6-2-10(a) (West Supp. 1993). The disclosure form requirement "only applies to a sale of, an exchange of, an installment sales contract for, or a lease with option to buy residential real estate that contains not more than four (4) residential dwelling units." IND. CODE § 24-4.6-2-1(a) (West Supp. 1993). Numerous types of transfers, including those ordered by a court, by a fiduciary in the course of administration of a trust, guardianship or estate and transfers involving the first sale of a dwelling that has not been inhabited, are excluded from the disclosure requirement. IND. CODE § 24-4.6-2-1(b) (West Supp. 1993).

79. Pub. L. No. 209-1993, § 2, 108th Gen. Assembly, 1st Reg. Sess. (1993) (adding IND. CODE § 24-4.6-2).

80. IND. CODE § 24-4.6-2-7(1) (West Supp. 1993). The statute permits the owner to prepare his own disclosure form that contains the information required in section 7 "and any other information the owner determines is appropriate." IND. CODE § 24-4.6-2-8 (West Supp. 1993).

. . . .
The representations made in this form are those of the owner and not the agent, if any. This information is for disclosure only and is not intended to be a part of any contract between the buyer and the owner.⁸¹

Section 9 indicates that the disclosure form is not a warranty by the owner or the owner's agent and may not be used as a substitute for any inspection or warranty the owner or buyer later obtain.⁸²

The statute provides that the owner is to complete and sign the disclosure form and submit it to the prospective buyer before an offer is accepted, and an offer is not enforceable against a buyer before closing until the owner and prospective buyer have signed the disclosure form.⁸³ The owner will not be liable for an error, inaccuracy or omission in information required to be provided, if the information was not within the actual knowledge of the owner or was based upon information supplied by a public agency or other person with a professional license or special knowledge who provided a written or oral report or opinion that the owner reasonably believed was correct.⁸⁴ If information is discovered before settlement, "the owner is required to disclose any material change in the physical condition of the property, or certify to the purchaser at settlement that the condition of the property is substantially the same as it was when the disclosure form was provided."⁸⁵

If a prospective buyer receives a disclosure form or an amended disclosure form after an offer has been accepted which discloses a defect, the prospective purchaser may within two (2) business days after receipt of the disclosure form nullify the contract by delivery of a written rescission to the owner or the

81. IND. CODE § 24-4.6-2-7(2)&(3) (West Supp. 1993).

82. IND. CODE § 24-4.6-2-9 (West Supp. 1993).

83. IND. CODE § 24-4.6-2-10(a) & (c) (West Supp. 1993). However, once the closing has taken place, the owner's failure to deliver the disclosure form to the buyer will not by itself invalidate a real estate transaction. *Id.*

84. IND. CODE § 24-4.6-2-11 (West Supp. 1993). However this section further requires that the owner not be "negligent in obtaining information from a third party and transmitting the information." *Id.*

85. IND. CODE § 24-4.6-2-12(a) (West Supp. 1993). However, a literal reading of the section does not require the owner to notify the buyer of any error, inaccuracy or omission contained in the disclosure form subsequently discovered by the owner. Section 12(a) requires only that he notify the purchaser of any material changes in the condition of the property (presumably since the time the disclosure form was provided) or certify that the condition of the property is substantially the same as it was at the time the disclosure form was provided. The owner would only be liable for such error, inaccuracy or omission if he had actual knowledge of it at the time he provided the disclosure form to the buyer or if he was negligent in obtaining such information from a third person and transmitting it to the buyer. IND. CODE § 24-4.6-2-11 (West Supp. 1993).

owner's agent. In such a situation the buyer is entitled to a return of any deposits made in the transaction.⁸⁶ This statute is a major departure from the then existing Indiana law which did not require a non-builder vendor of residential property to disclose defects in the condition of the property to the purchaser.⁸⁷

The legislature also enacted a second statute relating to the duty of the owner of residential real estate to disclose information to a transferee at the time of the sale, rental, or lease of the property. This statute specifically excludes any requirement that the owner disclose to the buyer that property is "psychologically affected."⁸⁸ The statute defines the term "psychologically affected property" to include real estate or a dwelling to which one (1) or more of the following facts or reasonable suspicion of facts may apply:

- (1) That an occupant of the property was afflicted with or died from a disease related to the human immunodeficiency virus (HIV).
- (2) That an individual died on the property.
- (3) That the property was the site of:
 - (A) a felony under I.C. 35;
 - (B) criminal gang (as defined in I.C. 35-45-9-1) activity;
 - (C) the discharge of a firearm involving a law enforcement officer while engaged in the officer's official duties; or
 - (D) the illegal manufacture or distribution of a controlled substance.⁸⁹

Under this statute, a real estate owner or his agent is not required to disclose to a prospective buyer "any knowledge of a psychologically affected property in a real estate transaction."⁹⁰ However, while the owner or agent is not liable for nondisclosure, "[a]n owner or agent may not intentionally misrepresent a fact concerning a psychologically affected property in response to a direct inquiry from a transferee."⁹¹

86. IND. CODE § 24-4.6-2-13 (West Supp. 1993).

87. Existing Indiana law did recognize an implied warranty of habitability in the sale of a new home by a builder/vendor. *E.g.*, *Theis v. Heuer*, 280 N.E.2d 300 (Ind. 1972); *Barnes v. Mac Brown & Co., Inc.*, 342 N.E.2d 619 (Ind. 1976). However, there were no implied warranties in the sale of a used home by a non-builder vendor. *E.g.*, *Vetor v. Shockey*, 414 N.E.2d 575 (Ind. Ct. App. 1980); *Lyons v. McDonald*, 501 N.E.2d 1079 (Ind. Ct. App. 1986). The mere failure to disclose a hidden defect known to the seller but unknown to the purchaser was not considered a fraudulent concealment. *Indiana Bank & Trust Co. v. Perry*, 467 N.E.2d 428 (Ind. Ct. App. 1984).

88. IND. CODE § 24-4.6-2.1 (West Supp. 1993); Pub. L. No. 210-1993, 108th Gen. Assembly, 1st Reg. Sess. (1993).

89. IND. CODE § 24-4.6-2.1-2 (West Supp. 1993).

90. IND. CODE § 24-4.6-2.1-4 (West Supp. 1993).

91. IND. CODE § 24-4.6-2.1-5 (West Supp. 1993).

B. Duration of Possibility of Reverter and Right of Entry

Indiana Code section 32-1-21⁹² provides that the possibility of reverter or right of entry for breach of a condition subsequent is invalid after thirty (30) years from the date of its creation if the breach of the condition has not occurred.⁹³ The statute specifically excludes from its application: the rights of a mortgagee based on the terms of the mortgage; a trustee or beneficiary under a trust deed in the nature of a mortgage based on the terms of the trust deed; a grantor under a vendor's lien reserved in a deed; a lessor under a lease for a term of years; or a person with a separate property interest in coal, oil, gas, or other minerals.⁹⁴ This is a major departure from the common law rule where the possibility of reverter or right of entry can last indefinitely.⁹⁵ This legislation should, and was obviously designed to, eliminate defects in the title which had outlived their usefulness and thereby increase the marketability of titles.

VI. REAL ESTATE BROKER: DUTIES AT CLOSING

Last year the Indiana Court of Appeals, in *McAdams v. Dorothy Edwards Realtors*,⁹⁶ concluded that the sellers' real estate broker Dorothy Edwards Realtors, Inc., could be held liable for the actions of its agent, Gary Taylor, who, after receiving the purchasers' down payment of \$40,079.68, failed to apply the funds to satisfy an existing mortgage on the property.⁹⁷ The purchase agreement stated that the title to the property was to be free and clear of all liens and encumbrances except those listed, and the title opinion by the purchasers'

92. Pub. L. No. 233-1993, 108th Gen. Assembly, 1st Reg. Sess. (1993) (adding IND. CODE § 32-1-21).

93. IND. CODE § 32-1-21-2 (West Supp. 1993). A saving clause was added allowing an action to recover property, to be commenced on or before June 30, 1994 where the possibility of reverter or right of entry was created before July 1, 1963 and the breach of the condition occurred before July 1, 1993. IND. CODE § 32-1-21-3 (West. Supp. 1993).

94. IND. CODE § 32-1-21-1(2) (West Supp. 1993).

95. These two future interests were not subject to the Rule Against Perpetuities. The only limitation on the duration of the possibility of reverter or the right of entry for breach of condition subsequent was the requirement in the Indiana Marketable Title Act that notice of the interest be re-recorded in the notice index within the effective date of the fifty-year root of title. IND. CODE § 32-1-5-1 *et seq.*

96. 591 N.E.2d 612 (Ind. Ct. App. 1992).

97. *Id.* at 614-17, 621-23. Although the action is brought against Dorothy Edwards Realtors and not Gary Taylor, both the court of appeals opinion and the subsequent supreme court decision refer to Taylor as the Parnells' broker or real estate agent and note that he is the principal owner of Dorothy Edwards Realtors. *Id.* at 614; *McAdams v. Dorothy Edwards Realtors*, 604 N.E.2d 607, 609 (Ind. 1992). This would appear to eliminate any argument by Dorothy Edwards that its agent, Taylor, was acting outside the scope of his authority, and may explain why the issue was never raised.

attorney, delivered directly to Taylor, indicated that the mortgage should be satisfied and released before closing.⁹⁸ Instead, Taylor used a portion of the down payment to pay other expenses, including the broker's real estate fees, and distributed the balance of \$29,184.50 to the seller.⁹⁹ Later, when the sellers defaulted on the mortgage and moved to Florida, the McAdams brought suit charging the bank with violating federal and state consumer credit laws and seeking to recover from Taylor the amount required to clear the lien on the property. The bank in turn sought foreclosure of the property. The trial court found that Taylor was a trustee with respect to the \$40,079.68 received from the McAdams and deposited in the Dorothy Edwards Realtors, Inc. Trust Account. However, the court of appeals concluded that the payment of the balance on the land contract plus interest to the bank would satisfy and release the bank's mortgage. On appeal by the bank and Edwards Realtor, the court remanded with instructions to enter an order of foreclosure.¹⁰⁰ To avoid foreclosure, the McAdams entered into an agreement to pay the bank \$46,565.32 and not to seek transfer to the Indiana Supreme Court. The McAdams then filed a motion to recover judgment against Edwards Realtors. The McAdams appealed when the trial court denied their motion and entered judgment for Edwards Realtors. Once again the court of appeals reversed, finding that a hearing should be held to determine the amount of damages based upon the trial court's original finding that Edwards Realtors' agent had breached his duty with regard to the distribution of the funds in the trust account.¹⁰¹ The Indiana Supreme Court granted transfer on the question of what duty, if any, a real estate broker owes a buyer "when the broker is the agent of the seller".¹⁰² Not surprisingly, from the way the question was framed, the court found the broker owed no duty to the purchaser and could not be held liable for disregarding the provisions of the Purchase Agreement and title opinion requiring the lien be satisfied: "We are unaware of any authority for the proposition that a seller's agent owes a buyer a duty to act in the buyer's best interest."¹⁰³ In presuming the broker was acting solely as seller's agent, the court seemingly ignored facts suggesting the agent was doing much more. Taylor furnished an abstract of the title to the McAdams' attorney, Joseph Davis, and Davis rendered a written title opinion

98. *McAdams*, 591 N.E.2d at 614, 621-23. The subsequent supreme court opinion, however, noted that the actual sales contract signed by the McAdams at the closing contained a provision allowing the sellers to maintain a mortgage on the premises which could not exceed at any time the balance owed by the McAdams to the Parnells. *McAdams*, 604 N.E.2d at 608.

99. *Id.* at 609.

100. *McAdams*, 591 N.E.2d at 615-18.

101. *Id.* at 622-23.

102. *McAdams v. Dorothy Edwards Realtors*, 604 N.E.2d at 608.

103. *Id.* at 611.

based on the abstract which concluded that the existing liens on the property should be satisfied and released at the closing:

He [Davis] provided this [title] opinion not to his client but directly to Taylor. Davis did not attend the closing the next day, and it was not until the closing that the McAdams saw his written opinion regarding the liens. There was testimony at trial that it is common practice in Howard County for attorneys to provide title opinions directly to real estate agents and not attend closings with their clients.

The McAdams-Parnell closing thus was fairly typical. Taylor presided. Also present were the McAdams, the Parnells, and Roy Bergman, another Edwards Realty agent. Taylor placed the McAdams down payment of \$40,079.68 in the Edwards Realtors trust account, as is customary in such transactions.¹⁰⁴

The trial court found that the broker had agreed to distribute the moneys to accomplish performance of the obligations under the Purchase Agreement and title opinion.¹⁰⁵ In addition, Taylor had talked to the mortgagee bank and got them to orally agree not to enforce the due-on-sale clause in the mortgage.¹⁰⁶ Taylor appears to have been the moving force in the real estate closing rather than simply the seller's agent.

This case may have an impact on the "common practice in Howard County" with regard to real estate closing. It may no longer be prudent for the purchaser's attorney to continue to permit the seller's broker to preside over the closing after this decision. The attorney can no longer rely on the real estate broker to protect his client's interest and must now take a more active role. As the court concluded: "If Taylor had advised the McAdams during the closing to step back and consult with counsel before signing such a contract, the resulting harm might have been avoided. Because Taylor was the sellers' agent, however, the law does not hold him financially accountable for failing to do so."¹⁰⁷

104. *Id.* at 609.

105. *Id.* at 610; 591 N.E.2d at 614-16.

106. *Id.* at 614.

107. 604 N.E.2d at 612.

VII. VENDOR AND PURCHASER

A. *Contract for Sale of Land: Statute of Frauds*¹⁰⁸

The requirement that there be written evidence of a contract for the sale of real property has its origin in the English Statute of Frauds:

. . . no action shall be brought . . . upon any contract or sale of lands, tenements or hereditament or any interest in or concerning them... unless the agreement upon which such action shall be brought or some memorandum or note thereof shall be in writing, and signed by the party to be charged therewith, or some other person thereunto by him lawfully authorized.¹⁰⁹

The sufficiency of the written memorandum needed to satisfy the statute of frauds was raised in *Johnson v. Sprague*.¹¹⁰ In *Johnson*, the purchaser (Sprague) sued for specific performance of a contract for the sale of a cottage. The seller (Johnson) appealed from the trial court's award of specific performance, claiming that the memorandum of sale did not satisfy the Statute of Frauds.¹¹¹

The facts indicate that after the parties had discussed the sale of the cottage and certain personal property located inside the cottage, and had agreed upon a sale price, they drafted two virtually identical documents. Sprague gave Johnson a check for \$1000 and each of the parties signed one of the documents. The document which Johnson signed read:

Check 7414 is for down payment on cottage

42,000.00

-1,000.00

41,000.00

108. The test for sufficiency of the memorandum set forth in the Restatement of Contracts § 207 has been approved by the Indiana courts. See, e.g., *Block v. Sherman*, 34 N.E.2d 951 (Ind. App. 1941); *Wertheimer v. Klinger Mills, Inc.*, 25 N.E.2d 246 (Ind. 1940).

A memorandum, in order to make enforceable a contract within the statute, may be any document or writing, . . . which states with reasonable certainty,

- (a) each party to the contract whether by his own name, or by such a description as will serve to identify him, or by the name or description of his agent, and
- (b) the land, goods or other subject matter to which the contract relates, and
- (c) the terms and conditions of all the promises constituting the contract and by whom and to whom the promises are made.

109. Stat. 29 Car. II, c.3 § 4 (1677). The Indiana version of the statute of frauds is found in IND. CODE § 32-2-1-1 (1979).

110. 614 N.E.2d 585 (Ind. App. 1993)

111. *Id.* at 587.

I will relinquish if I don't buy or finish in one month—Aug. 13, 91.¹¹² The parties then discussed the preparation of the deed and evidence of title, and it was agreed that Sprague's attorney would prepare these documents for closing. Sprague invited friends over to the cottage and Johnson indicated to them that she had sold the cottage to Sprague. However, Johnson failed to provide any evidence of title, and on August 7, 1991, Johnson's attorney sent Sprague a letter, with Sprague's uncashed check enclosed, informing him that there was no valid contract to sell the cottage. Sprague then sued for specific performance.¹¹³

In discussing whether the written memorandum satisfied the requirements of Indiana's Statute of Frauds, the court observed that:

Under the statute, an enforceable contract for the sale of land must be evidenced by a writing: (1) which has been signed by the party against whom the contract is to be enforced or his authorized agent; (2) which describes with reasonable certainty each party and the land; and, (3) which states with reasonable certainty the terms and conditions of the promises and by whom and to whom the promises were made. *Blake v. Hosford*, 387 N.E.2d 1335, 1340 (Ind. App. 1979), *trans. denied*.

....

The parties to a contract have the right to define their mutual rights and obligations, and a court may not make a new contract or supply omitted terms while professing to construe a contract. . . . Absolute certainty in all terms is not required, but if any essential elements are omitted or left obscure and undefined, so as to leave the intention of the parties uncertain respecting any substantial terms of the contract, the case is not one for specific performance. *Workman v. Douglas*, 419 N.E.2d 1340, 1345 (Ind. App. 1981).¹¹⁴

Johnson argued the written memorandum was insufficient, because it did not contain an express promise to convey title. The court observed, however, that the statute of frauds only requires "reasonable certainty in the terms and conditions of the promises made, including by whom and to whom," and that in a real estate contract the mutual intent to buy and sell is implicit—it "is the very purpose for the transaction and need not be stated expressly within the written agreement."¹¹⁵

Johnson further contended that because the parties failed to reach an agreement on the allocation of responsibility for the payment of real estate taxes

112. *Id.*

113. *Johnson*, 614 N.E.2d at 587.

114. *Id.* at 588.

115. *Id.*

the agreement was missing an essential term. The court agreed that it could not supply a missing essential term to make a contract different from the one agreed upon by the parties, but concluded that a provision for the payment of real estate taxes is not an essential and substantial term which the parties must agree upon before the real estate contract is enforceable. In Indiana, real estate taxes are paid in arrears and the allocation of responsibility for their payment is usually a matter for negotiation.¹¹⁶ Where there is no agreement regarding the payment of taxes, the existing law becomes a part of the contract.¹¹⁷ Since the law provides the buyer is to receive good title at the closing free from all encumbrances, including any liens for real estate taxes, the seller must pay all taxes which would be a lien on the property at the time of the closing.¹¹⁸ Similarly, the court found that the failure to agree upon the payment of a common area maintenance fee and a pier assessment was not an essential term. If these fees were Johnson's personal obligations they would remain with her after the sale, but if they are a lien on the property or could give rise to a lien then it would be the seller's obligation to convey the title free of such encumbrances.¹¹⁹

Next, Johnson contended that there was a parol agreement not included in the written memorandum with respect to the sale of certain personal property such as a refrigerator and stove located within the cottage. The court, however, found that an oral agreement for the sale of personal property collateral to the sale of real estate does not come within the statute of frauds, and does not render the contract for sale of real estate invalid.¹²⁰

Finally, Johnson argued that the oral agreement as to who would provide evidence of title and prepare the deed was not included in the written memorandum. The court observed, however, that the oral agreement occurred after the parties had signed and exchanged the written documents and that it was not a prior or contemporaneous agreement. Again, the lack of agreement as to the

116. *Id.* at 589. "In some cases, the taxes are pro-rated to the date of closing. In other cases the seller will pay the taxes due through a certain May or November installment, and the buyer will assume and agree to pay all taxes which become due and payable thereafter." *Id.*

117. *Id.* Had the parties orally agreed on the responsibility for the payment of taxes and it was omitted from the written memorandum, the memorandum would not have satisfied the statute of frauds, because the written agreement would not have contained all the terms agreed upon by the parties. *Block v. Sherman*, 34 N.E.2d 951 (Ind. App. 1941).

118. *Johnson*, 614 N.E.2d at 589. The court distinguished its holding in *Workman v. Douglas*, 419 N.E.2d 1340 (Ind. Ct. App. 1981), where it had held a provision for the payment of real estate taxes was an essential and substantial term. *Workman* involved a long term installment sales contract with payments over a 25 year period. Agreement as to the responsibility for the payment of taxes over the length of the contract was an essential term which the parties must have agreed upon. Here, the transfer of title was to occur within thirty days and the law provides for the payment of taxes absent agreement. *Johnson*, 614 N.E.2d at 589.

119. *Id.*

120. *Id.* at 589-90.

closing is not essential to the enforceability of the contract for sale: “[I]t is well settled as a matter of common and actual practice that the responsibility for providing a good and sufficient warranty deed and proof of title belongs with the seller.”¹²¹

The court concluded that while the written memorandum might have been more complete, it was sufficient to meet the requirements of the Indiana statute of frauds. It identified the parties, the real estate, the purchase price, the closing date and contained Johnson’s signature. The trial court’s judgment granting specific performance was affirmed.¹²²

B. Specific Performance and Damages

Where a party to a contract for the sale of real estate brings an action for specific performance, an award of specific performance may not make the party whole. Expenses may have been incurred as a result of the delay in performance beyond the date fixed in the contract. In *Bohlin v. Jungbauer*,¹²³ the purchasers (the Jungbauers) sought both specific performance of the contract for sale and damages resulting from the delay in closing. The trial court granted specific performance and awarded the purchaser \$20,945.18 in damages. The sellers (the Boulins) appealed \$18,576.68 of the damages.¹²⁴

On appeal the court observed that the granting of specific performance of the contract “erases the breach and precludes damages at law,” but in order to adjust the equities of the parties, the trial court may award “equitable compensation.”¹²⁵

A decree of specific performance enforces the contract as nearly as possible. Here the closing was to have occurred on May 1, 1991, but because of a defect in the title it was necessary for the seller to bring a quiet title action, which was

121. *Id.* at 590.

122. *Id.* at 590. The trial court also awarded the plaintiff attorney fees. This portion of the judgment was reversed. The court of appeals noted that Indiana follows the American rule which generally requires each party to pay their own attorney fees absent a statute or contractual agreement to the contrary. Here, the court found that while the parties had agreed to share legal expenses for the preparation of the deed and evidence of title, they had not agreed to pay attorney fees for breach of contract. *Id.* at 590. Indiana does recognize an exception to the American rule where a party is guilty of “obdurate behavior.” *Gap Gamini Am., Inc. v. Judd*, 597 N.E.2d 1272 (Ind. App. 1992) (to qualify as obdurate behavior the conduct must be vexatious and oppressive in the extreme, and the defendant forced to defend against a baseless claim). Here the court found that Johnson’s position was plausible even though she did not prevail. *Johnson*, 614 N.E.2d at 590-91.

123. 615 N.E.2d 438 (Ind. App. 1993).

124. *Id.* at 439. The damages were itemized in the decision, and include such expenses as apartment rental, cost of commuting, loss of summer income, long distance phone calls, and increased lumber prices. *Id.*

125. *Id.* at 439 (citing *North v. Newlin*, 435 N.E.2d 314, 319-20 n.2 (Ind. Ct. App. 1982)).

not concluded until December, 1991. This action for specific performance and expenses caused by the delay in closing was filed in February, 1992. The recovery of expenses occasioned by the delay in closing is viewed as an accounting between the parties and not an assessment of damages.¹²⁶ Because the trial court failed to conduct an accounting, the court of appeals reversed and remanded. However, in so doing the court made the following observations. First, the trial court should have treated the Jungbauers as the equitable owners from the closing date and awarded them the reasonable rental value of the residence, although to prevent unjust enrichment the Jungbauers should be required to pay interest on the purchase price from the date of closing.¹²⁷ This would have eliminated any need to consider the rent paid by the Jungbauers for additional housing.¹²⁸ Second, the court observed that the party paying "for the permanent improvements, maintenance, insurance premiums, property taxes, assessments, repairs, and the like on the property" should receive credit for such expenditures.¹²⁹

In examining the list of expenses claimed by the purchaser the court remarked that while Indiana law provided no specific guidance, equity should provide a complete adjustment of the rights of the parties.¹³⁰ With regard to the commuting expenses and the long distance phone calls, the court found them too speculative to be included in the accounting.¹³¹ In addition, some jurisdictions disallow damages such as storage costs, commuting expenses, costs of moving a second time, additional housing and increased interest rates. Other jurisdictions allow these additional expenses, but only where there is a "time is of the essence" clause in the contract. The mere inclusion of a closing date in the contract does not make time of the essence unless the terms of the contract or the conduct of the parties indicate such an intention.¹³² Here, the court found no evidence to indicate that time was of the essence and hence the Jungbauers could not recover the additional expenses sought.¹³³

On the issue of attorney fees the court observed that the agreement provided that "in connection with any litigation arising out of this agreement, the prevailing party shall be entitled to recover all costs incurred, including reasonable attorney fees."¹³⁴ The court concluded that the attorney fees connected with the closing and the settlement of the claim for breach of contract

126. *Bohlin*, 615 N.E.2d at 439.

127. *Id.* at 440.

128. *Id.* at 440 n.2.

129. *Id.* at 439.

130. *Id.* at 440 (citing *Lewandowski v. Beverly*, 420 N.E.2d 1278, 1282 (Ind. App 1981)).

131. *Bohlin*, 615 N.E.2d at 440.

132. *Id.* at 440-41.

133. *Id.* at 441.

134. *Id.* at 441.

were not part of the action for specific performance and were not recoverable under the "plain words of the Agreement."¹³⁵

The Jungbauers also sought to recover appellate attorney fees. Indiana follows the American rule that, absent a statute or agreement, each party pays their own attorney fees. Here, however, the contract for sale provided that the prevailing party may recover reasonable attorney fees "in connection with any litigation arising out of this agreement." Where the parties have agreed that the prevailing party may recover attorney fees in an action to enforce the contract, the Indiana courts have found that such a provision includes appellate attorney fees.¹³⁶ The court of appeals directed the trial court to hold a hearing on the issue of appellate attorney fees and determine what are appropriate appellate attorney fees.¹³⁷

135. *Id.* The sellers did not dispute the award of the attorney fees in connection with the litigation for specific performance. *Id.*

136. See *Nylen v. Park Doral Apartments*, 535 N.E.2d 178, 185 (Ind. Ct. App. 1989); *Radio Distrib. Co., Inc. v. National Bank and Trust*, 489 N.E.2d 642, 649 (Ind. Ct. App. 1986).

137. *Id.* One might question whether any appellate attorney fees should be awarded to the Jungbauers, since it is not clear that they are the "prevailing party" in the appeal. The court reversed the major portion of the damages award and concluded that the trial court failed to conduct an accounting. While the Youngerbauers have prevailed in their action for specific performance, the Bohllins appear to have prevailed in their appeal on the issue of damages.

1993 DEVELOPMENTS IN INDIANA TAXATION

LAWRENCE A. JEGEN, III*

JOHN R. MALEY**

INTRODUCTION

Although 1993 was a relatively quiet year for Indiana tax developments, several important changes in procedural law occurred. The most significant change is the legislature's enactment of a direct appeal to the Indiana Tax Court from Letters of Findings issued by the Department of Revenue. This Article highlights the enactment of the direct appeal and other key procedural developments.

I. INDIANA TAX COURT

A. *Expanded Jurisdiction*

The Indiana Tax Court's jurisdiction over most final determinations rendered by the Department of Revenue has been settled since the court's inception. Original tax appeals involving denials of claims for refunds of the listed taxes of Section 6-8.1-1-1 of the Indiana Code, which includes more than twenty-five different taxes such as the gross retail and use taxes, go to the Indiana Tax Court. This is clear because Indiana Code Section 6-8.1-9-1(c), which formerly directed such appeals to county courts, was amended with the creation of the Indiana Tax Court to provide that such appeals must be filed with the Indiana Tax Court.¹

What had not been clear was whether taxpayers could appeal to the Indiana Tax Court from a "Letter of Findings" issued by the Department. A Letter of Findings is issued after a taxpayer protests a Department assessment.² However, appeals to the Indiana Tax Court only lie from "final determinations" of the Department of the State Board of Tax Commissioners.³ Until 1993, it was

* Thomas F. Sheehan Professor of Tax Law and Policy, Indiana University School of Law—Indianapolis. B.A., Beloit College; M.B.A., J.D., University of Michigan; LL.M., New York University.

** Associate, Barnes & Thornburg, Indianapolis. Adjunct Professor, Indiana University School of Law—Indianapolis. Lecturer, Indiana Bar Review. B.A., 1985, University of Notre Dame; J.D., *summa cum laude*, 1988, Indiana University School of Law—Indianapolis.

1. Compare IND. CODE § 6-8.1-9-1(c) (1982) (appeals from denials of refund claims go to circuit or superior courts) with IND. CODE § 6-8.1-9-1(c) (Supp. 1985) (such appeals must go to the Indiana Tax Court).

2. IND. CODE § 6-8.1-5-1(c), (e) (1993).

3. IND. CODE § 33-3-5-2(a) (1993).

unknown whether a Letter of Findings constituted a final determination of the Department for jurisdiction in the Indiana Tax Court.

In 1991, the authors of this Article addressed this issue at length, noting that no decision or statute speaks directly to the topic.⁴ The authors concluded that although the question of jurisdiction remained unanswered at that time, on balance the "proper answer, though unfortunate, might be that the Indiana Tax Court does not have jurisdiction in this setting."⁵ To remedy this deficiency, the authors proposed specific legislation to allow for appeals from Letters of Findings.⁶

In 1993, the legislature responded by enacting H.B. 1573.⁷ P.L. 71-1993 amends Section 6-8.1-5-1 of the Indiana Code, and allows taxpayers to appeal to the Indiana Tax Court within 180 days after a Letter of Findings is issued.⁸

Appeal from a Letter of Findings is a welcome improvement to the Indiana tax system, for it allows taxpayers to appeal an assessment without first paying the contested listed tax and filing a claim for refund. The Department is not precluded, however, from seeking to collect the tax after issuance of a Letter of Findings. Taxpayers who wish to litigate without the threat of collection action must either persuade the Department to refrain from collection, or petition for and obtain an injunction from the Indiana Tax Court pending the original tax appeal.⁹

B. Expert Witnesses and Contingency Fees

In *Wirth v. State Board of Tax Commissioners*,¹⁰ the Indiana Tax Court held that a taxpayer may compensate an expert witness in an Indiana tax dispute on a contingency basis.¹¹ The issue arose in a taxpayer's appeal of his real property tax assessment.¹² To support his case, the taxpayer hired a property tax consultant whose fee was contingent on the outcome of the appeal.

Although the State Board did not raise the issue, Judge Fisher addressed the matter *sua sponte*, noting that "the question of the propriety of the witness's testimony exists."¹³ In addressing this question of first impression in Indiana, Judge Fisher observed the "prevailing general rule that it is inappropriate to pay

4. Lawrence A. Jegen, III & John R. Maley, *Developments in Indiana Tax Law: Further Refinements of the Indiana Tax Court's Jurisdiction, and the Attack on Indiana's Property Tax System*, 24 IND. L. REV. 1125, 1126-32 (1991).

5. *Id.* at 1129, 1131-32.

6. *Id.* at 1132.

7. P.L. 71-1993 (signed by Governor Bayh and effective on May 12, 1993) (Found in 6 West's Indiana Legislative Service 1993 Acts 1857 (1993)).

8. IND. CODE § 6-8.1-5-1(g) (1993).

9. IND. CODE § 33-3-5-11(b), (c) (1993).

10. 613 N.E.2d 874 (Ind. T.C. 1993).

11. *Id.* at 877.

12. *Id.* at 875.

13. *Id.* at 876.

an expert witness a contingent fee.”¹⁴ He also cited to the Comment to Rule 3.4(b) of the Indiana Rules of Professional Conduct, which states that the “common law rule in most jurisdictions is that it is improper . . . to pay an expert witness a contingent fee.”¹⁵

Nonetheless, Judge Fisher held that “the testimony of contingently paid experts is not subject to exclusion in tax court cases solely on the basis of the expert's contingent fee.”¹⁶ Instead, the contingent fee goes to the weight of the testimony rather than admissibility because the potential for abuse is less in the Indiana Tax Court where all cases are tried without juries.¹⁷

Although *Wirth* allows experts to be paid by contingent fees in Indiana tax cases, practitioners should avoid such an arrangement for two reasons. First, the expert's credibility is naturally suspect when payment depends on success on the merits. Second, the Indiana Supreme Court has not yet addressed this issue, and if it ever does, it could reach a contrary conclusion. Thus, contingent fee agreements are advisable in Indiana tax cases only when an expert is necessary but cannot be afforded on a standard hourly basis.

II. PROPERTY TAXES

A. *Improved Appeal Procedures*

Legislative amendments during 1993 expand the time period for appealing property tax assessments and streamline the process for reopening an assessment after it has been fixed. Under prior law, taxpayers desiring to appeal changes in their assessments had to file an appeal within thirty days of the notice of changed assessment.¹⁸ In addition, if taxpayers wished to reopen an assessment on their own, it was generally necessary to file a Form 134 Petition for Reassessment by March 31 of the assessment year.

House Bill 1842 amends prior law by allowing taxpayers to appeal changed assessments by filing the appeal form within forty-five days after the notice or by May 10 of the assessment year, whichever is later.¹⁹ If the taxpayer misses the filing deadline, the appeal is still effective for the next assessment date.²⁰

House Bill 1842 also amends prior law by allowing taxpayers to reopen their assessment in any year by filing an appeal directly with the county auditor for

14. *Id.*

15. INDIANA RULES OF PROFESSIONAL CONDUCT Rule 3.4(b) (1987).

16. 613 N.E.2d at 877.

17. *Id.*

18. IND. CODE § 6-1.1-15-1(a) (1992).

19. IND. CODE § 6-1.1-15-1(b) (1993).

20. IND. CODE § 6-1.1-15-1(c) (1993).

review by the county board of review.²¹ These new procedures took effect January 1, 1994.²²

B. Further Notice Developments

Last year's tax survey discussed three key decisions in Indiana addressing the requirements for notice to owners in property tax sales.²³ One of those decisions, *Elizondo v. Read*,²⁴ holds that county auditors are charged with knowledge of any address for the taxpayer that is within their records if the alternate listing links the taxpayer to the subject property.²⁵ Auditors are not, however, required to search records unconnected with the subject property to give notice of tax sales.²⁶

During 1993, the Indiana Tax Court applied *Elizondo* to the State Board of Tax Commissioners.²⁷ As Judge Fisher explained in *Mynsberge v. State Board of Tax Commissioners*:

The constitutional concerns underlying *Elizondo* are equally valid when the public authority in question is the State Board as when it is a county auditor. Regardless of which government entity is providing notice of action taken or to be taken, "[a]n elementary and fundamental requirement of due process in any proceeding which is to be accorded finality is notice reasonably calculated, under all the circumstances, to appraise interested parties . . . and afford them an opportunity to present their objections."²⁸

Applying *Elizondo* to the facts of *Mynsberge*, Judge Fisher ruled that the State Board failed to provide due process. In *Mynsberge* the taxpayer filed a Form 131 for review of assessment on a building he owned in Elkhart County. The petition contained both the taxpayer's separate business address and the subject building's mailing address. Thereafter, the taxpayer moved his business but failed to inform the Board of his new address.²⁹

In July of 1992, the State Board entered its final determination on the subject building and mailed notice to the taxpayer's previous business address.

21. IND. CODE § 6-1.1-15-1(d) (1993).

22. P.L. 41-1993, § 56 (declaring an emergency for H.B. 1842, thus making it effective on its date of approval, May 6, 1993) (found in 5 West's Indiana Legislative Service 1993 Acts 1615 (1993)).

23. Lawrence A. Jegen, III & John R. Maley, 1992 *Developments in Indiana Taxation*, 26 IND. L. REV. 1145, 1154-57 (1993).

24. 588 N.E.2d 501 (Ind. 1992).

25. *Id.* at 504.

26. *Id.*

27. 612 N.E.2d 1129 (Ind. T.C. 1993).

28. 612 N.E.2d at 1131.

29. 612 N.E.2d at 1130.

The post office returned the notice undelivered. The State Board put the notice in the file without taking further action.

Thereafter, the Elkhart County Treasurer sent the taxpayer the tax statement for the subject property by mailing it directly to that location, where the taxpayer received it. The taxpayer then filed an original tax appeal from the State Board's July 1992 final determination. The appeal was not filed, however, within the required forty-five days from the Board's ruling.³⁰ Thus, unless the State Board's notice were inadequate, the Tax Court would have lacked jurisdiction due to an untimely appeal.

Judge Fisher found the notice inadequate because the State Board could have ascertained from its own records that an alternate address was available for the subject building. Indeed, the building's mailing address was on file for the taxpayer. The court explained:

[W]hen the postal service returns a final determination undelivered, the State Board is required to ascertain from its records whether any alternate address linking the subject property to the taxpayer or the taxpayer's representative exists. If there is such an address, the State Board must then attempt to deliver the final determination to that alternate address.

....

Even though there was nothing to link the subject property to Mynsberge at his new office address, the State Board nonetheless had an alternate address available. On a single sheet of paper, [the taxpayer's] petition for review contained not only his old office address, but the mailing address of the subject property, as well. It goes without saying that here was an alternate address intimately and inherently linked to the subject property. When the final determination was returned undelivered to [the] old office address, the State Board should then have used the address of the subject property to send the final determination to [the taxpayer] a second time.³¹

Because the notice was inadequate the taxpayer's original tax appeal was deemed timely.

All is not lost for the State Board, however, for the duty to find alternate addresses is not boundless. As Judge Fisher explained, "In accord with *Elizondo*, however, the State Board need not engage in speculation, as would be required if there were nothing to link the alternate address to the subject property."³² "Moreover," the court wrote, "the State Board is not required to search or inquire outside its office to find an alternate address."³³

30. IND. CODE § 6-1.1-15-5(d) (1993).

31. 612 N.E.2d at 1132.

32. *Id.*

33. *Id.*

The practical lesson for tax practitioners is to ensure that taxpayers' current mailing addresses are kept up to date with all necessary governmental officials. Furthermore, when timely notice has not been issued to a client, practitioners should inquire further to determine whether the applicable agency might have breached its duty to discover an alternate address on file linking the subject property to the taxpayer.

III. LISTED TAXES — RECORD KEEPING

The legislature amended IND. CODE § 6-8.1-5-4 which addresses records that must be kept for listed taxes. Under this provision, every person subject to a listed tax must keep "books and records so that the department can determine the amount, if any, of the person's liability for that tax by reviewing those books and records."³⁴ Copies of any state or federal tax returns must also be retained.³⁵ The amendment expands these burdens by requiring taxpayers to retain "all source documents necessary to determine the taxes, including invoices, register tapes, receipts, and canceled checks."³⁶

These records, returns, and source documents must be maintained for at least three years after the date the final payment of the particular tax liability was due unless, after an audit, the Department consents to earlier destruction.³⁷ Where the taxpayer fails to file a return or receives notice from the Department that the taxpayer has filed a suspected fraudulent, unsigned, or substantially blank return, the records must be retained permanently.³⁸

34. IND. CODE § 6-8.1-5-4(a) (1993).

35. IND. CODE § 6-8.1-5-4(b) (1993).

36. IND. CODE § 6-8.1-5-4(a) (1993).

37. *Id.*

38. *Id.*

INDIANA TORT LAW REVIEW 1993

FRANK E. BOOKER*

INTRODUCTION

A survey of the significant cases of the Indiana appellate courts during 1993 in the field of torts law (other than products liability), reveals significant changes in the areas of punitive damages,¹ incurred risk, and Samaritan immunity. In each of these areas the Courts have steered toward the mainstream of the American common law, and handed down strong, consistent decisions.

I. THE DEFENSE OF INCURRED RISK IN INDIANA

"The Reports of my death are greatly exaggerated."²

Roughly a decade ago, Indiana's legislature crossed the Rubicon, leaving the land of common law negligence to enter the territory of Comparative Fault.³ To the distress of those who attempt to predict outcomes in Indiana tort law, it is far from clear how much crossed over, and how much was left to dwell in the classic territory of former Indiana common law.⁴ In no area is this situation more perplexing and exacerbated than in the area of incurred risk.⁵ Perhaps some scholar might improve upon the analysis of Professor Wilkins, published on the eve of the new era, but I certainly cannot, and an annual survey seems an inappropriate place to attempt to outline a precise and detailed analysis.

In January of 1993 one commentator called attention to the fact that the status of the defense of incurred risk under the nearly ten-year-old Comparative Fault Act is still unsettled.⁶ This commentator argued from the rather plain

* Professor of Law, Notre Dame Law School; Co-Director, Notre Dame London Law Centre, 1990; Visiting Professor, University of Innsbruck School of Law, Innsbruck, Austria, 1991.

1. Indiana law regarding punitive damages was significantly affected this survey year by the Indiana Supreme Court decision in *Miller Brewing Co. v. Best Beers of Bloomington, Inc.*, 608 N.E.2d 975 (Ind. 1993). For an analysis of the changes in this area of law, see Judy L. Woods & Brad A. Galbraith, *Recent Developments in Contract and Commercial Law*, 27 IND. L. REV. 769 (1994).

2. Samuel Langhorne Clemens (a.k.a. Mark Twain), *Cable from London to the Associated Press* (1897).

3. Act of April 21, 1983, Pub. L. No. 317—1983, IND. CODE § 34-4-33-1(a)(2).

4. See generally Lawrence P. Wilkins, *The Indiana Comparative Fault Act at First (Lingering) Glance*, 17 IND. L. REV. 687 (1984).

5. *Id.* at 757-94; see also Baker, *Has Adoption of Indiana Comparative Fault Act Abolished Incurred Risk?*, 36 RES GESTAE 356 (Feb. 1993) (indicating that the questions and difficulties identified by Professor Wilkins in 1984 remain, alas, very much alive a decade later).

An out of state attorney, or someone using national instead of Indiana terminology, would probably refer to this defense as assumption of risk, or secondary assumption of risk.

6. See Baker, *supra* note 5.

language of the Act itself⁷ that incurred risk, as a defense separate from general comparative fault, should be considered as abolished by the Act, and no separate jury instruction upon this defense should be given.⁸ He marshalled out-of-state decisions to support his conclusion, and although selected Indiana cases were discussed, they seemed to say little on the point of abolition or the unsettled questions of Professor Wilkins' article.⁹ Since the publication of the *Res Gestae* article, there have been three published opinions on incurred risk from the Indiana Supreme Court and Court of Appeals. What seems to emerge from these opinions is that, while we do not seem any closer to answering Professor Wilkins' insightful questions, any report of the death of the defense of incurred risk in Indiana is definitely premature. The doctrine, far from being dead, does not even appear to be sick.

Of the three new cases, the easiest to dispose of is *Clark v. Wiegand*.¹⁰ In *Clark*, the plaintiff was a student at Indiana State University, who had been injured when thrown in an elective Judo class. She sued the teacher supervising the class (an employee of ISU) and the ISU Board of Trustees. She did not proceed against the fellow student who actually threw her. Thus, *Clark* was an action against a state college or university,¹¹ entities which are specifically excluded from the reach of the Comparative Fault Act.¹² Such an action, therefore, is still subject to the common law, including the defense of incurred risk. However, the Indiana Supreme Court made no mention of this fact,¹³ and as a result, the case can easily be incorrectly read as applicable to the defense of incurred risk under the Comparative Fault Act. Actually, it has nothing to say either way on that point, and would seem to be properly read as indicating that, *to whatever extent the defense of incurred risk may survive* in Indiana law, it has the qualities identified in the *Clark* opinion.

In *Clark*, the Supreme Court held that the student's knowledge of the risk of being thrown to the mat did not conclusively, as a matter of law, establish her knowledge, and acceptance, of the risk of being thrown to the mat and incurring a disabling ligament injury to her knee.¹⁴ In order to find incurred risk as a matter of law, the Court required that the risk subjectively known to the plaintiff be the very risk, or at least very near the risk, which actually overtook her. Therefore, it appears that the *Clark* opinion restricts the "no prescience of specific accident required" language of the earlier *Mauler*¹⁵ and *Forrest*¹⁶

7. 36 RES GESTAE 356 at n.1 (arguing from IND. CODE § 34-4-33-2).

8. *Id.* at 361.

9. *Id.* at 356-58, nn.5-8.

10. 617 N.E.2d 916 (Ind. 1993).

11. IND. CODE § 34-4-16.5-2(f)(7) (Supp. 1993).

12. IND. CODE § 34-4-33-8.

13. No mention is made in either the majority, dissent, or footnotes of what is otherwise a quite detailed six page treatment. 617 N.E.2d 916-21.

14. *Id.* at 919.

15. *Mauler v. City of Columbus*, 552 N.E.2d 500, 503, at n.3 (Ind. Ct. App. 1990),

cases, upon which the defendant University had heavily relied.¹⁷ It would be a bit strong to say this defense was “pruned back,” but it is perhaps accurate to note that the defense of incurred risk sustained a slight narrowing of the arteries entirely consistent with its respectably mature years. The following two Court of Appeals cases, which are not governmental cases, are consistent with this change.

In *Smith v. AMLI Realty Co.*,¹⁸ the court below had granted the defendant a summary judgment, finding that the plaintiff, a child of nine years of age, was barred from all recovery by the defense of incurred risk. The Court of Appeals noted that the trial court had simply “failed to refer to comparative fault in its ruling” and resolved the case by reversing on the error as to the *substance* of the defense of incurred risk, rather than dealing with the *effect* that should be given the defense under current comparative fault law. The Court of Appeals reversed the trial court, finding that there were issues of material fact regarding the defense of incurred risk,¹⁹ because although there was no dispute as to the evidence, conflicting inferences could be drawn from it by a jury.²⁰

In *Smith*, the child plaintiff was injured while lawfully playing on an exercise machine in the exercise room of the defendant’s apartment complex, in which the plaintiff’s father lived. His playmate was a little girl, who hung by her knees from a “lat bar” on the machine, connected by cable and pulley to seventy pounds of weights. She asked the plaintiff to help her get down. The plaintiff placed both hands under the weights and lifted, permitting his playmate

trans. denied (quoting *Tavernier v. Mays*, 51 Cal. Rptr. 575, 582 (1966)).

It is this “no prescience of exact risk” language which *Clark*, may be looked at as cutting back a bit. On the other hand, the facts of *Clark*, where a female college student was thrown and seriously injured by a 260 lb. member of the varsity football team, of whom she had expressed fear (based upon past rough encounters) to the defendant instructor, and been told she would have to deal with her fear, made the plaintiff’s position in *Clark* particularly appealing to traditional male protective and chivalrous attitudes, factors much less marked in *Mauller* and *Forrest*, though those cases also involved female claimants.

16. *Forrest v. Gilley*, 570 N.E.2d 934, 936 (Ind. Ct. App. 1991) quoting the “no prescience of specific accident” language from *Hamilton v. Roger Sherman Architects Group, Inc.*, 565 N.E.2d 1136, 1138, at n.3 (Ind. App. 1 Dist. 1991), which in turn, quoted the language from *Mauller*.

Actually, it seems impossible to make any sense of the *Hamilton* and *Forrest* opinions, if in fact the Comparative Fault Act abolished the defense of incurred risk in Indiana, but those are cases of earlier years, and the attempt here is to focus on the new developments of 1993.

Mauller, being a case against a city, was specifically left under common law by the Comparative Fault Act, and while *Forrest* and *Hamilton* can be read as leaving small but tantalizing possibilities of being given an abolition reading, the author believes such a reading would be very labored (but of course, not impossible).

17. *Clark v. Wiegand*, 617 N.E.2d 916, 919 (Ind. 1993).

18. 614 N.E.2d 618 (Ind. Ct. App. 1993).

19. If the defense was abolished by the Act, how could any fact concerning the defense be material?

20. 614 N.E.2d at 620-21.

to be lowered. However, when she jumped off the bar, leaving the plaintiff with the whole weight, it was more than he could handle alone. The weights crashed to their resting place upon a stack of weights, injuring the plaintiff's fingers.

The plaintiff child testified at deposition that he knew the weights would go down when the bar went up, and that if he left his hand or foot under the weights when they were coming down he could possibly be hurt.²¹

The Court of Appeals reviewed and applied the standard common law for children of the plaintiff's age as the standard for contributory negligence;²² that is, a child is to be held to the standard of care ordinarily exercised by children of the same age, knowledge, judgment, and experience under similar circumstances. Without discussion or citation to authority, the court applied this standard to a child confronted with the defense of incurred risk, and *seemed*²³ to indicate that a jury should be instructed to judge the child by that standard. The Court of Appeals observed that a jury might find that the weights were not yet descending when the plaintiff put his hands beneath them, that he may not have understood that his playmate would release the bar, or that he may have thought that he could hold the weights alone.²⁴ Reviewing standard Indiana law for this defense, the Court pointed out that in order to sustain a summary judgment that plaintiff had incurred the risk *as a matter of law*, the evidence must reveal without conflict that the plaintiff had actual knowledge of the specific risk and understood and appreciated that risk.²⁵ Because this was not the situation, the case was remanded for a trial on the merits.

In its holding that the more forgiving "child" standard should be applied to a plaintiff of age nine confronted with the defense of incurred risk, and that a plaintiff must actually, subjectively *know* the risk, and that a child plaintiff, at least, must *understand* and *appreciate* the risk he incurs to be found guilty of incurred risk as a matter of law, the Court of Appeals indicates that it does not intend to expand or extend the defense of incurred risk beyond prior bounds in Indiana, and perhaps can be seen as carefully limiting the reach of the prior *Mauler* holding.²⁶

Finally, in *K-Mart Corp. v. Beall*,²⁷ the Second District echoed the same view, holding that the defense of incurred risk requires actual knowledge and voluntary assumption of the risk.²⁸ The plaintiff in *K-Mart*, shopping in the aisle of a warehouse-type Builder's Square store, passed near a ladder while he was looking for goods near the floor level. He did not look up to see a store

21. *Id.* at 620.

22. *See Brockmeyer v. Fort Wayne Pub. Transp.* 614 N.E.2d 605, 607, 609 (Ind. Ct. App. 1993) (a governmental case still subject to full common law defenses).

23. *Smith*, 614 N.E.2d at 621.

24. *Id.*

25. 614 N.E.2d at 620.

26. 552 N.E.2d 500, 503 (Ind. Ct. App. 1990), *trans. denied*.

27. 620 N.E.2d 700 (Ind. Ct. App. 1993).

28. *Id.* at 704.

employee shifting goods some fifteen feet up. A box of electrical receptacles fell on the plaintiff's neck, injuring him. On that evidence, the court held that it was not reversible error for the trial court to deny defendant a requested instruction on the defense of incurred risk.²⁹

The Court of Appeals held that the tendered traditional incurred risk instruction "correctly stated the law relating to the defense of Incurred Risk"³⁰ and discussed it as a living part of current Indiana law.³¹ The court ultimately held that the evidence did not require the instruction, and further, that the defendant had not been prejudiced by its denial, as there was no actual knowledge or voluntary incurrence of the risk on the part of the plaintiff, since he was not aware of the work atop the ladder.³² The trial court instructed the jury correctly on contributory fault, in the more usual sense of inadvertent contributory negligence, and indeed, the jury assigned some fault to plaintiff and apparently diminished his recovery. The Court of Appeals affirmed.

Once again, the emphasis on the classic requirements that the risk which overtakes the plaintiff, or something very close to it, must be subjectively known to the plaintiff and voluntarily encountered, is in harmony with the notes struck by the Indiana Supreme Court in *Clark* and the Third District in *Smith*. The present course of the Indiana higher courts therefore seems to be to confine the defense of incurred risk carefully within the boundaries of classic common law. However, any conclusion that the defense of incurred risk has been abolished and no separate instruction should be given on it seems decidedly premature. Further, the questions Professor Wilkins posed a decade ago were in no way impacted or resolved by this year's cases on the subject of incurred risk.³³

II. SAMARITAN'S ACQUIRED STATUTORY IMMUNITY FOUND DEFICIENT

Physician, watch thy step!

The basic common law held that when one undertook to act, even though he had no duty to act, he was bound to act with ordinary care.³⁴ This principle applied in Indiana.³⁵ Those who have reached middle age may remember the

29. *Id.*

30. *Id.* (Certainly an odd and awkward remark if the Comparative Fault Act abolished the defense of incurred risk. How can a tendered instruction correctly state the law of an abolished defense? Of course, one could read this as merely awkward dicta).

31. 620 N.E.2d 700. There is nearly a full page of closely reasoned discussion and analysis of authorities about this defense.

32. 620 N.E.2d at 704.

33. *See supra* notes 4-5.

34. W. PAGE KEETON, ET. AL., PROSSER & KEETON ON TORTS § 56, at 378 (5th ed. 1984); O.W. HOLMES, JR., THE COMMON LAW 278, 279 (48th printing, Little Brown & Co.) (1991); CLARENCE MORRIS, MORRIS ON TORTS 126-32 (2d ed. 1980).

35. *See, e.g.,* Simpson's Food Fair, Inc. v. City of Evansville, 272 N.E.2d 871 (Ind. Ct. App. 1971).

considerable agitation of the early 1960s resulting from the general belief that the American common law of torts was an unconscionable mess, that juries were awarding huge judgments to undeserving claimants, and that a prime example of this evil state of affairs, urgently demanding immediate remedy, was the rule which exposed the good Samaritan to the risk of negligence liability, whilst the priest and the Levite who callously passed by on the other side got off scot free.³⁶ It was argued that physicians were being substantially victimized by this rule.³⁷

Thereafter, many legislatures attempted to remedy what was believed to be a real evil, and Indiana's was among them. In 1963 the original version of the present statute was enacted,³⁸ immunizing from negligence liability Indiana-licensed practitioners of the healing arts who acted gratuitously as good Samaritans at the scene of an accident. In 1971 the statute was rewritten to protect any person who so acted at the scene of an accident or gave emergency care to the victim thereof.³⁹ This is the present law in Indiana.⁴⁰

The reality of the crisis which prompted this statute should be examined in light of the fact that careful research shows no reported appellate case in the United States of a physician/Samaritan being held liable before the enactment of this statute,⁴¹ and there have been only four appellate cases in Indiana relying on the act in the thirty years it has been on the books.⁴² Two of those were not healer's cases, and the statute did not in fact apply to *any* of the four cases where defendants sought shelter behind it. This particular "crisis" bears a striking resemblance to *The Emperor's New Clothes*,⁴³ but perhaps, as in the case of the original artifact, if one possessed more virtue, one too could see the garment. Whether the "Soak the Samaritan" crisis was real or not, it was believed to be real by many good people, and it is beyond question that real

36. *Union Pac. Ry. v. Cappier*, 72 P. 281 (Kan. 1903); *Wilmington Gen. Hosp. v. Manlove*, 174 A.2d 135 (Del. 1961) (no past good deed goes unpunished). For the original, happier account, see Luke 10:30.

37. One useful lead into this story is recorded by Professor C. Morris, MORRIS, *supra* note 34, at 131.

38. Indiana Samaritan Immunity Act, 1963 Ind. Acts ch. 319, § 1.

39. 1971 Ind. Acts, Pub. L. No. 447, § 1.

40. IND. CODE § 34-4-12-1 (West 1988).

41. The editors of NEWSWEEK and EMERGENCY MEDICINE magazines, despite offering a bounty, could find none. See Morris, *supra* note 34.

42. *Dreibelbis v. Bennett*, 319 N.E.2d 634 (Ind. Ct. App. 1974) (passer-by directing traffic at accident); *McKinney v. Public Serv. Co. of Ind., Inc.*, 597 N.E.2d 1001 (Ind. Ct. App. 1992) (passing driver stopped to assist changing of flat tire); *Beckerman v. Gordon*, 614 N.E.2d 610 (Ind. Ct. App. 1993) (doctor); *Steffey v. King*, 614 N.E.2d 615 (Ind. Ct. App. 1993) (doctor); both doctor cases *aff'd*, 618 N.E.2d 56 (Ind. Ct. App. 1993). There have been NO reported cases to which the statute has ever applied.

43. Hans Christian Andersen, *The Emperor's New Clothes* (1835); BARTLETT'S FAMILIAR QUOTATIONS 505 (15th ed. 1980).

crises *did* exist in physicians' fears and malpractice insurance rates.⁴⁴ It should be noted that the physician/Samaritan problem was only one small part of the medical malpractice liability/health care controversy, which continues to gain strength and divisive intensity today, and which is part of a controversy over the role and future of tort law and government in our society. All of the larger controversies, "crises" if one likes, are quite real, and the fact that the imagined woes of the Samaritan/physician are not real should not obscure the reality or seriousness of these problems. The limited lesson of this nobly intentioned (but so far universally inapplicable) statute is that it would behoove a serious person to be extremely careful in assaying facts in these general areas. Great interests and strong emotions are involved, and smoke, mirrors, and spin doctors are easier to find than facts, on every side of these debates.⁴⁵

The opinions of the Second District Court of Appeals, construing the present Indiana Samaritan Immunity Act in the cases of two physicians who gave emergency care, seem to be models of the skill and spirit with which one would hope appellate courts everywhere would approach cases in such controversial areas. I would include the single dissenting/concurring opinion in this observation.

In *Beckerman v. Gordon*,⁴⁶ Dr. Beckerman responded to a telephone call from Mr. Gordon in the early hours of the morning. Mr. Gordon's wife was in distress from pain in her left chest radiating to her arm, nausea, and was feeling very hot. Dr. Beckerman was not Mrs. Gordon's physician, but was in practice with her regular doctor, and lived a few blocks from the Gordons. Responding to Mr. Gordon's request, Dr. Beckerman promptly made a house call to the Gordon's home.⁴⁷ He diagnosed Mrs. Gordon with pleurisy (a painful but not dangerous illness) and gave her medicine appropriate for that condition from samples in his bag. An hour later, Mrs. Gordon began gasping and choking, and Dr. Beckerman was again telephoned, and returned in less than five minutes. Although he administered cardio-pulmonary resuscitation, Mrs. Gordon remained in full cardiac arrest and died. Her symptoms had been caused by a massive heart attack rather than pleurisy. A malpractice claim was commenced, but Dr.

44. For a fairly conventional repetition of the ordinary perception of these matters see PATRICIA DANSON, *TORT LAW AND THE PUBLIC INTEREST* 176-81 (Peter Schuck ed., 1991).

45. For an example of the surprises encountered when a skilled and careful lawyer runs down the actual facts behind the claimed "truths" special interests are trying hard, on both sides, to sell us in these areas, see C. Hoodenpyl, Jr., *Medical Malpractice Litigation in Indiana*, 20 RES GESTAE 126 (1976) (a ten year survey). I recommend this, and another praiseworthy digging for the *facts*, covering a broader spectrum, Indiana Continuing Legal Education Forum, Indiana State Bar Association, *Medical Negligence Litigation*, 1993 (June 15-16, 1993).

46. 614 N.E.2d 610 (Ind. Ct. App. 1993), *reh. denied*, 618 N.E.2d 56 (Ind. Ct. App. 1993).

47. This is not a typographical error. Dr. Beckerman made not one, but *two* house calls, within minutes of being called, for someone who was not his patient, in the early hours of the morning. See *id.* at 611.

Beckerman's attorney claimed that the doctor did not have to answer the case before the medical panel because he was immune from negligence liability under the Samaritan statute.⁴⁸ The trial court held that the statute did not give Dr. Beckerman immunity on these facts, and the Court of Appeals affirmed in a two-to-one decision, on the basis that the immunity statute was in derogation of the common law, and thus should be strictly construed, and concluded that the statutory language is limited to cases of *accident*, rather than covering the whole spectrum of emergency care from every cause.⁴⁹

As a result, it was held that Dr. Beckerman was not immune, and his case would have to follow the normal medical malpractice claim procedure, beginning with the customary medical panel.⁵⁰ The case, and the *Steffey* case which came up with it, should not be read as turning upon some oversight or neglect of substantive law or procedure by counsel. The attorneys for all parties appear to have presented these cases with great determination and skill.⁵¹

In *Steffey v. King*,⁵² Mrs. Steffey was in the hospital awaiting delivery of her child. It was expected that hers would be a breach delivery and the medical plan was to proceed to normal delivery, falling back on caesarian section if it became necessary. The attending doctor left the delivery room, and could not be found when Mrs. Steffey spontaneously commenced breach delivery. The baby was partly delivered, Mr. Steffey holding its legs, when the nurse went for assistance and returned with Doctor Templeton, the Samaritan in this case. Dr. Templeton employed forceps and delivered the child, the plaintiff Aaron, alive, but blue-green in color and with indentations in the sides of his head. Aaron allegedly sustained injuries of some consequence in this procedure. In this case, which came from another county, the trial judge ruled that Dr. Templeton, the Samaritan, was immune under the statute. The Second District Court of Appeals held unanimously that these events, while an emergency, were not an *accident* as required by the language of the statute to confer immunity.⁵³ Further, the judge who had dissented in *Beckerman* did not find the quality of unexpectedness

48. IND. CODE § 34-4-12-1 (Burns 1988). The relevant part of the statute reads: "Any person, who in good faith gratuitously renders emergency care at the scene of an *accident* or emergency care to the victim *thereof*, shall not be liable for any civil damages" (emphasis added).

49. *Beckerman*, 614 N.E.2d at 612-13. The dissent would have interpreted the critical statutory word "accident" to include sudden grave emergency illnesses which come on as an unexpected surprise to the patient and would have left the issue of whether Mrs. Gordon's illness was such to a jury. See *id.* at 614-15 (Sullivan, J., dissenting) (further explained in Judge Sullivan's concurrence in the companion case of *Steffey*, 614 N.E.2d 615, 617, 618 (Sullivan J., concurring)).

50. *Id.* at 611, 613.

51. I have simplified the procedure of these cases in this report without misstating the holdings to aid in clarity. The change of venue, summary judgment motions, and possible *res judicata* procedural questions illustrate how diligently these cases were presented.

52. 614 N.E.2d at 615.

53. *Id.* at 617.

which his broader interpretation of the word "accident" would require. He pointed out that a breach birth was expected, and Mrs. Steffey had entered the hospital in due course and time for her breach delivery. He therefore concurred in *Steffey*, making the holding unanimous, that the Samaritan/physician Templeton was not within the immunity statute.⁵⁴

Both of these cases were joined again and reheard, and the opinion was published three months later. This reinforces the perception that these cases were hard and skillfully fought, but the only new idea in the opinion was *dicta* favorable to the physicians. The opinion says that physician/Samaritans in these situations are entitled to the more relaxed standard of care of the sudden emergency doctrine. That is, that one who acts in a sudden emergency not of his own making is held to a lesser standard of care, by factoring in the fact that he acted during a sudden emergency.⁵⁵

The new development for the past year in the medical malpractice area in this State indicates that illnesses, even sudden grave ones, are not *accidents* to which the Samaritan immunity statute will apply. Under the Indiana Samaritan statute, an accident is a single, discrete event, not a condition, even though the condition gives rise to an emergency. Physicians giving emergency care are said to be entitled to the benefit of the emergency doctrine.

IV. CONCLUSION

One can do little better than to quote the words of the authors of last year's survey, indicating that "[d]uring this survey period, Indiana courts again took advantage of opportunities to bring Indiana tort law into the mainstream."⁵⁶ It is perhaps natural that the character and direction of the Indiana appellate courts, which are the same in structure and personnel as they were in 1992, should

54. *Id.* at 617-18.

55. *Beckerman*, 618 N.E.2d at 57. There are no authorities cited for the proposition that physicians in medical emergency cases, where they often act in exigent circumstances, but generally hold themselves out as capable of dealing skillfully with emergencies, would ordinarily be given a "sudden emergency" jury instruction, or that the Indiana medical panel should use this standard. Is an emergency room physician entitled to a sudden emergency instruction? A physician whose patient takes a sudden critical turn? *Sed quaere*. In any event, unlike the other parts of these well crafted opinions, this idea seems to have been thrown in without the same careful consideration the rest of the ideas expressed received. It is strictly speaking only *dicta*, and was thrown in as makeweight to an argument that these cases (and the interpretation of the immunity statute they made) will not seriously inhibit a doctor's decision to provide emergency medical assistance.

Modern physicians are careful about their exposure to malpractice liability, even in Indiana. These decisions (*Beckerman* and *Steffey*) are correct, but will increase the already serious caution with which healers approach potential Good Samaritan situations. The Court of Appeal thought otherwise. Whichever opinion is correct on this question, the two cases seem correct in their interpretation of the immunity statute.

56. Karen A. Jordan & Neal Lewis, *Survey of 1992 Developments in Tort Law*, 26 IND. L. REV. 1159 (1993).

continue on a course of "steady as she goes." This course seems a strong one, emphasizing the natural strengths of the common law system, and a proper deference to the legislative branch. To those who might prefer a more exciting scenario of judicial activism with judicial legislators or super legislators, and who would derogate Indiana's present course as "back to the future," I would suggest that most of today's difficult problems seem to be only the unanticipated faces of yesterday's incompletely thought out activist solutions. Indiana's appellate courts seem to me to serve well and wisely by maintaining their mainstream course.

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